

No. 87-519-CFH
Status: GRANTED

Title: Gary D. Maynard, Warden, et al., Petitioners
v.
William T. Cartwright

Docketed:
September 21, 1987

Court: United States Court of Appeals
for the Tenth Circuit

See also:
87-5355
87-5676

Counsel for petitioner: Lee, David W., Dickerson, Susan
Stewart

Counsel for respondent: Welch, Mandy

Entry Date Note Proceedings and Orders

-
- 1 Sep 21 1987 G Petition for writ of certiorari filed.
2 Sep 21 1987 Appendix of petitioner Maynard, Warden, et al. filed.
4 Oct 13 1987 Order extending time to file response to petition until
November 24, 1987.
6 Nov 22 1987 X Brief of respondent William T. Cartwright in opposition
filed.
7 Nov 22 1987 G Motion of respondent for leave to proceed in forma
pauperis filed.
5 Nov 24 1987 DISTRIBUTED. December 11, 1987
9 Dec 16 1987 REDISTRIBUTED. January 8, 1988
10 Dec 18 1987 REDISTRIBUTED. January 8, 1988
12 Jan 11 1988 Motion of respondent for leave to proceed in forma
pauperis GRANTED.
13 Jan 11 1988 Petition GRANTED. limited to Question 1 presented by the
petition.

14 Jan 25 1988 G Motion of respondent for appointment of counsel filed.
15 Jan 27 1988 DISTRIBUTED. February 19, 1988. (Motion of respondent for
appointment of counsel).
16 Feb 16 1988 Record filed.
*
17 Feb 22 1988 Certified copy of original record and proceedings
received. (Box).
Motion for appointment of counsel GRANTED and it is
ordered that Mandy Welch, Esq., of Norman, Oklahoma, is
appointed to serve as counsel for the respondent in this
case.
18 Feb 25 1988 Joint appendix filed.
19 Feb 25 1988 Brief of petitioners Maynard, Warden, et al. filed.
20 Feb 25 1988 Brief amici curiae of Alabama, et al. filed.
21 Mar 11 1988 G Motion of Roger Dales Hayes for leave to file a brief as
amicus curiae filed.
22 Mar 11 1988 SET FOR ARGUMENT, Tuesday, April 19, 1988. (1st case).
24 Mar 25 1988 CIRCULATED.
23 Mar 28 1988 Motion of Roger Dales Hayes for leave to file a brief as
amicus curiae GRANTED.
25 Mar 28 1988 X Brief of respondent William T. Cartwright filed.
26 Mar 28 1988 X Brief amicus curiae of California Appellate Project filed.
28 Apr 7 1988 X Supplemental brief of respondent William T. Cartwright
filed.
27 Apr 8 1988 X Reply brief of petitioners Maynard, Warden, et al. filed.
29 Apr 19 1988 ARGUED.

87 519⁽¹⁾

No. _____

Supreme Court, U.S.
FILED

SEP 21 1987

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals has been interpreting the aggravating circumstance, "especially heinous, atrocious, or cruel" in an unconstitutionally overbroad manner when that court relies upon the attitude of the murderer, the manner of the killing, and the suffering of the victim when it reviews death sentences in which that aggravating circumstance has been found.

2. Whether the finding by a federal court on constitutional grounds that the aggravating circumstance, "especially heinous, atrocious, or cruel" was invalid, requires the death sentence to automatically be vacated despite the fact that another valid aggravating circumstance has been found by the jury.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The Petitioner, the State of
Oklahoma, and the Attorney General of
Oklahoma, Robert H. Henry (hereinafter
referred to as the "State"), pray that a
writ of certiorari issue to review the
judgment of the United States Court of

Appeals for the Tenth Circuit in this matter.

OPINIONS BELOW

The decision of the United States Court of Appeals from which certiorari is sought is reported as Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc). This opinion was filed on June 22, 1987 (App. A). This decision vacated the opinion of the original three judge panel, which had affirmed the denial of Cartwright's (hereinafter referred to as the "Defendant") petition for a writ of habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

The en banc opinion reversed the order and judgment of the United States District Court for the Eastern District of Oklahoma, Cartwright v. Maynard,

86-54-C (E.D. Okla. filed Feb. 11, 1986)
(App. B).

The opinion of the Oklahoma Court of Criminal Appeals in the post-conviction appeal in this case is at Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985) (App. C), cert. denied, 106 S.Ct. 837 (1986), which affirmed the findings of fact and conclusions of law of the District Court of Muskogee County in State v. Cartwright, No. CRF-82-192 (filed Aug. 26, 1985) (App. D).

The opinion of the case on direct appeal is reported as Cartwright v. State, 695 P.2d 548 (Okla. Crim. App. 1985), cert. denied, 473 U.S. 911 (1985) (App. E).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

**RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS**

The Fourteenth Amendment to the
Constitution of the United States
provides, in pertinent part:

No State shall . . . deprive any
person of life, liberty or
property, without due process of
law. . . .

Okla. Stat. Ann. tit. 21, § 701.7

(West 1983) states:

A. A person commits murder in the
first degree when he unlawfully and
with malice aforethought causes the
death of another human being.
Malice is that deliberate intention
unlawfully to take away the life of
a human being, which is manifested
by external circumstances capable
of proof.

B. A person also commits the crime
of murder in the first degree when
he takes the life of a human being,
regardless of malice, in the
commission of forcible rape,
robbery with a dangerous weapon,
kidnapping, escape from lawful
custody, first degree burglary or
first degree arson.

C. A person commits murder in the
first degree when the death of a

child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

Okla. Stat. Ann. tit. 21, § 701.9

(West 1983) states:

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

Okla. Stat. Ann. tit. 21, § 701.10 (West 1983) states:

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the

defendant and the state, of if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. Ann. tit. 21, § 701.11 (West 1983) states:

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it

unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. Ann. tit. 21, § 701.12 (West 1983) states:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed in performance of official duty.

Okla. Stat. Ann. tit. 21, § 701.13 (West 1983) (since amended) stated:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together

with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and
3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Okla. Stat. Ann. tit. 21 § 701.13
(West 1983) (since amended).

The Defendant then filed a petition for writ of certiorari with the United States Supreme Court, on July 1, 1985 this Court denied the petition. Cartwright v. Oklahoma, 473 U.S. 911 (1985). Next, the Defendant filed an application for post-conviction relief in the District Court of Muskogee County, and that application was denied by the district court on August 26, 1985 (App. D).

The Defendant then appealed the denial of this application for post-conviction relief to the Oklahoma Court of Criminal Appeals, which unanimously affirmed the denial of the post-conviction application. Cartwright v.

State, 708 P.2d 592 (Okla. Crim. App. 1985) (App. C).

On January 13, 1986 this Court denied the Petitioner's second petition for a writ of certiorari. Cartwright v. Oklahoma, 106 S.Ct. 837 (1986).

On February 6, 1986, the Petitioner filed a petition for writ of habeas corpus in the United States District court for the Eastern District of Oklahoma. On February 11, 1986 that court denied the petition (App. B).

The Defendant then appealed the denial of his petition for writ of habeas corpus to the United States Court of Appeals for the Tenth Circuit. The original three judge panel affirmed the denial of the Defendant's Petition for Writ of Habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

However, the Circuit granted rehearing en banc, and on June 22, 1987, the entire panel issued an opinion in which it reversed the denial of the Defendant's petition as to the sentencing stage of the Defendant's trial. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987).

The court held that the Oklahoma Court of Criminal Appeals had failed to apply a proper narrowing construction to the aggravating circumstance "especially heinous, atrocious, or cruel." The court stated that the state appellate court's construction of this aggravating circumstance did not genuinely narrow the class of murders to which the death penalty was to be applied, in violation of Zant v. Stephens, 462 U.S. 862 (1983), and Godfrey v. Georgia, 446 U.S. 420

(1980). 822 F.2d at 1491 (App. A., at 71).

The court also held that since juries in Oklahoma weighed aggravating and mitigating circumstances, and since the Court of Criminal Appeals did not conduct an independent reweighing on appeal when an invalid aggravating circumstance had been found, the holding in Barclay v. Florida, 463 U.S. 939 (1983) was not applicable. The court in Cartwright stated that the overbroad construction of the aggravating circumstance "especially heinous, atrocious, or cruel," required that the death sentence be invalidated, despite the fact that the jury found the existence of another aggravating circumstance, that the Defendant knowingly created a great risk of death to more than one person. Cartwright v.

Maynard, 822 F.2d at 1481-83. The court held that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments." Id. at 1483; (App. A, at 28).

REASONS WHY THE WRIT SHOULD
BE GRANTED

PROPOSITION I.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, WHICH HELD THAT THE OKLAHOMA COURT OF CRIMINAL APPEALS APPLIED THE AGGRAVATING CIRCUMSTANCE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN OVERBROAD MANNER, CANNOT BE RECONCILED WITH INTERPRETATIONS OF THIS AGGRAVATING CIRCUMSTANCE BY THE FOURTH, FIFTH, AND ELEVENTH CIRCUITS.

In the present case, reported as Cartwright v. Maynard, 822 F.2d 1477,

1471 (10th Cir. 1987), the Tenth Circuit held that the Oklahoma Court of Appeals had not applied a constitutionally required narrowing construction to the aggravating circumstances "especially heinous, atrocious, or cruel."

The jury in Cartwright was given the following definition of "especially heinous, atrocious, or cruel:"

As used in these Instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

The instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), a case referred to in Proffitt v. Florida, 428 U.S. 242, 255 (1976).

The Tenth Circuit in the present case noted that because the Oklahoma Court of

Criminal Appeals, in reviewing cases in which that aggravating circumstances had been found, has held that either the attitude of the killer, the manner of the killing, or the suffering of the victim can be used to uphold a jury finding that this aggravating circumstance existed. The Tenth Circuit ruled that the Oklahoma court had not interpreted the aggravating circumstance in a way that genuinely narrowed the class of persons subject to the death sentence. 822 F.2d at 1488-91 (App. A, at 67-71).

The State contends that this ruling conflicts with that of the Eleventh Circuit in Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir. 1985), cert. denied, 106 S.Ct. 1993 (1986). In that case (which involved a victim who died from loss of blood caused by several

knife wounds¹), the Eleventh Circuit noted:

[The petitioner's] charge that the phrase "especially heinous, atrocious or cruel" is unconstitutionally vague has been decisively repudiated by the United States Supreme Court. Proffitt v. Florida, 428 U.S. 247, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924-25 (1976).

The opinion of the Tenth Circuit in Cartwright can be read to imply that the aggravating circumstance "especially heinous, atrocious, or cruel" must be limited to those cases where the victim has suffered from physical abuse, and factors such as the attitude of the killer cannot be considered in determining whether the murder in question fit the definition. See Cartwright 822 F.2d at 1488-90. The

¹See Booker v. State, 397 So.2d 910, 912 (Fla. 1981).

court also criticized the Oklahoma court for allowing reliance on all of the circumstances of the crime in determining whether the murder was "especially heinous, atrocious, or cruel." Id. at 1490 ("inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense"), and at 1491 ("Consideration of all of the circumstances is permissible; reliance upon all of the circumstances is not.").

If there is a constitutional distinction between "consideration" and "reliance" in this context, it is one that is not understood by the State.

In Turner v. Bass, 753 F.2d 342, 352 (4th Cir. 1985), rev'd on other grounds sub. nom. Turner v. Murray, 106 S.Ct.

1683 (1986), the Fourth Circuit upheld the death sentence in a case where the petitioner (who was convicted of shooting a store owner with a handgun), and rejected his challenge to the aggravating circumstance in question, that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. While noting that the Supreme Court of Virginia, applying Godfrey v. Georgia, 446 U.S. 420 (1980), had adopted a requirement that the murder involve either torture or "aggravated battery," the Fourth Circuit stated that the facts of the murder in Turner "was cold-blooded and calculated, involving no emotional trauma as was present in Godfrey." In other words, the court

reviewed the attitude of the killer in determining whether the evidence supported the aggravating circumstance, which was identical to the review conducted by the Oklahoma Court of Criminal Appeals in the present case.

In addition to the fact that the Fourth Circuit relied upon the attitude of the killer in upholding the death sentence, the State in the present case also points out that the requirement of an "aggravated battery" does not necessarily make the aggravating circumstance less vague. Any murder committed with a knife or a firearm arguably involves "aggravated battery" to the victim. Certainly it could be argued that the victim in the present case, Hugh Riddle, was a victim of an "aggravated

battery" since he was shot twice with a shotgun.

Nor is there any noticeable difference between the death of Hugh Riddle and the victim in Turner v. Bass, 753 F.2d at 344, 352-53. The petitioner in Turner shot the victim in the head with a handgun and then shot him again twice as he lay "still living, helpless and 'gurgling.'" Presumably he was unconscious, since the opinion states that only a witness pleaded with the petitioner not to shoot anyone else, and the opinion of the Supreme Court of Virginia in that case states that the store owner was shot in the temple. Turner v. Commonwealth, 273 So.2d 36, 39 (Va. 1980). Since the victim was rendered unconscious by the first

gunshot, it is obvious that he was not a victim of torture.

Furthermore, other cases have upheld the aggravating circumstance "especially heinous, atrocious, or cruel when the victim suffered only psychological torture. See, e.g., Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1987) (victims were executed by being shot one by one in the head in the presence of the others). See also White v. Wainwright, 809 F.2d 1478, 1485 (11th Cir. 1987) (the aggravating circumstance, "especially heinous, atrocious, or cruel, was properly applied to a participant in the Francois murders who was opposed to the executions).

In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir. 1987) the court upheld the finding by the federal district court

that the aggravating circumstance "especially heinous, atrocious, or cruel" was properly submitted to the jury without a limiting instruction and without sufficient evidentiary support from the facts in the case. See also Evans v. Thigpen, 631 F.Supp. 274, 284-85 (S.D. Miss. 1986). The facts in Evans reveal that the victim was shot in the head as he knelt motionless behind a store owner during a robbery. Id. at 284; Evans v. State, 422 So.2d 737, 739 (Miss. 1982). The federal district court stated (using reasoning that was later adopted by the Fifth Circuit, 809 F.2d at 241):

In such circumstances, the mental anguish and psychological torture suffered by the victim prior to the infliction of the death-producing wound may be considered with respect to the "heinous, atrocious or cruel" factor and make its application constitutionally

unobjectionable. Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1984).

631 F.Supp. at 285.

Certainly the victim in the present case, Mr. Riddle suffered the same mental anguish as did the victim in Thigpen.

Furthermore, making physical suffering an aspect of "especially heinous, atrocious, or cruel" would mean that there has been a narrowing of the class of persons eligible for the death sentence strictly for its own sake. There is no rational basis for prohibiting a State from imposing the death sentence upon a defendant who has killed in a manner that causes the victim to die immediately. The requirement that a victim suffer physical pain before this aggravating circumstance has been met would mean that in many cases if the

killer is a poor marksman whose gunshot did not cause immediate death, he or she would be a candidate for the death sentence, while a good marksman would escape the death sentence because his or her victim was killed immediately.

This distinction could also mean that someone who killed by stabbing with a knife, see, e.g., *Palmer v. Wainwright*, 725 F.2d 1511, 1523-24 (11th Cir. 1984), cert. denied, 469 U.S. 873 (1984), would be a candidate for the death sentence, while those who used firearms would not. Those killers who use firearms should not receive the special protection this distinction would breed.²

² Significantly, all four Presidents of the United States who have been assassinated have died as a result of gunshot wounds (Lincoln, Garfield, McKinley, and Kennedy).

The requirement that the aggravating circumstance in question be limited by such a restrictive definition would result in an inappropriate intrusion into the substantive punishment imposed upon murderers by the States. Cf. California v. Ramos, 463 U.S. 992, 1001 (1983) (the Court notes that it has traditionally "deferred to the State's choice of substantive factors relevant to penalty determination.").

Finally, another sentencing standard that is at least as vague has been upheld by this Court. See Barefoot v. Estelle, 463 U.S. 880, 896-99 (1983) (prediction of future dangerousness is an acceptable criterion for an aggravating circumstance).

PROPOSITION II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FINDING OF AN INVALID AGGRAVATING CIRCUMSTANCE BY A FEDERAL COURT AUTOMATICALLY REQUIRES THE DEATH SENTENCE TO BE INVALIDATED EVEN IF ANOTHER VALID AGGRAVATING CIRCUMSTANCE HAS BEEN FOUND BY THE JURY.

In the present case the Tenth Circuit invalidated the death sentence based on Oklahoma's failure to adopt what the Tenth Circuit believed was a constitutionally required limitation on the definition of the aggravating circumstance "especially heinous, atrocious, or cruel." This was done despite the finding by the jury of another aggravating circumstance, that the defendant knowingly created a great risk of death to more than one person.

In Zant v. Stephens, 462 U.S. 862, 890 (1983) the Court stated:

Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

In the present case the Tenth Circuit answered this question by holding that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments." 822 F.2d at 1483.

The Tenth Circuit held that the present case was different from Zant because Oklahoma's death penalty scheme requires the sentencer to "weigh" aggravating against mitigating circumstances, whereas under Georgia law

there is no requirement that aggravating circumstances be balanced against mitigating circumstances. Id. at 1479.

The distinction between those two types of sentencing processes was noted by this Court in Barclay v. Florida, 463 U.S. 939, 954 (1983). In Barclay, however, in his concurring opinion Justice Stevens noted that "[t]he Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime." Id. at 967.

In the present case the evidence supporting the aggravating circumstance "especially heinous, atrocious, or

cruel," was directly related to the character of the defendant and the circumstances of the crime. Furthermore, the instruction did not enumerate what the mitigating circumstances would be, merely stating that "[t]he determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case" (R. 207). See also Okla. Stat. Ann. tit. 21, § 701.10 (West 1983) (mitigating circumstances are not enumerated). Cf. Barclay v. Florida, 463 U.S. at 962-63 (Stevens, J. concurring) (aggravating circumstances are weighed against "statutorily enumerated mitigating circumstances").

Therefore, the State contends that the finding of the aggravating circumstance, that the defendant

knowingly created a great risk of death to more than one person, in addition to the allegedly invalid one involving the "especially heinous, atrocious, or cruel" standard, was a sufficient "individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. Cf. Lowenfield v. Phelps, 817 F.2d 285, 288-89 (5th Cir. 1987), cert. granted, 107 S.Ct. 3227 (1987) (single aggravating circumstance that merely repeated an element of the crime sufficiently narrowed the class of persons eligible for the death sentence).

In Welcome v. Blackburn, 793 F.2d 672, 677-79 (5th Cir. 1987), a Louisiana case, the prosecutor argued and presented evidence on only one aggravating circumstance (that the defendant

"knowingly created and risk of death or great bodily harm to more than one person") and the trial judge read the entire list of aggravating and mitigating circumstances to the jury. The jury found the existence of the one argued by the prosecutor, and also found that the killing was "committed in an especially heinous, atrocious, or cruel manner."

The Fifth Circuit held:

Where the jury finds at least one aggravating circumstance that was valid and supported by the evidence, this Court has ruled that the refusal to review the validity of additional aggravating circumstances found by the jury is permissible as long as the jury's finding of arguable invalid aggravating circumstances "affected none of petitioner's substantial rights." Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982).

793 F.2d at 678. The court also stated:

Welcome asserts that the jury's unwillingness to impose the death penalty for the murder of

Maturin demonstrates that they imposed the death penalty for his killing of Guillory based solely upon a finding of heinousness. Under State v. Culberth, 390 So.2d 847 (La. 1980), the aggravating circumstance of heinousness is satisfied only if the killing involves torture or the pitiless infliction of unnecessary pain on the victim. Welcome asserts that there was no proof that would satisfy this standard. Assuming this is so, we find that the clear proof of the first aggravating circumstance - the killing of two persons in a consecutive course of conduct - is sufficient to demonstrate that the jury finding of heinousness was harmless error.

793 F.2d at 678 (footnote omitted).

In Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, 106 S.Ct. 2259 (1986), the court, in rejecting a defendant's contention that, since the Louisiana Supreme Court had previously held that one of the aggravating circumstances was unconstitutionally vague, the death sentence in his case must also be invalidated, stated:

David, however, is readily distinguishable from the instant case. In David, "a significant prior history of criminal activity" was the sole aggravating circumstance found by the jury. Here, the jury found two other aggravating circumstances supporting their recommendation of the death sentence. It is now settled law that "a death sentence supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."

(Emphasis original.) See also Williams v. Maggio, 679 F.2d 381, 386-90 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (death sentence properly upheld where Louisiana Supreme Court reviewed only one of the three aggravating circumstances found by the jury).

These cases are significant because under Louisiana's capital punishment scheme, the jury weighs the aggravating circumstances against mitigating

circumstances when determining whether to impose the death sentence. See State v. Willie, 410 So.2d 1019, 1033 (La. 1982) appeal after remand, 436 U.S. 1019 (1984)

where the court stated:

Having found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance(s) so found, before recommending the more appropriate penalty, either a penalty of life imprisonment without parole or a sentence of death. State v. Sonnier, 402 So.2d 650, 657 (La. 1981).

See also State v. Knighton, 436 So.2d 1141, 1158 (La. 1983), cert. denied, 465 U.S. 1051 (1984).

These pronouncements seem to be contradicted by those of the Fifth Circuit in Wilson v. Butler, 813 F.2d 664, 674 (5th Cir. 1987), which stated that Louisiana law does not require weighing of aggravating against

mitigating circumstances. This statement was supposedly based on review of the Louisiana sentencing statute, La. Code Crim. Pro. Ann. 905.3 (West 1986) and the court's reading of several Louisiana cases.

The above-mentioned sentencing statute states:

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

(Emphasis added.)

Obviously the jury is engaged in a weighing process if it considers both the aggravating circumstance it has found and then imposes sentence, and the question of whether the jury either "weighed" or "considered" each is basically a matter of semantics. See also Gray v. Lucas,

677 F.2d 1086, 1106 (5th Cir. 1982), on rehearing, 685 F.2d 139 (5th Cir. 1982), cert. denied, 463 U.S. 1237 (1983) (under Mississippi law the jury weighs aggravating against mitigating but may still sentence the defendant to life even if aggravating circumstances outweigh mitigating circumstances).

In Oklahoma, the jury also is not required to impose a death sentence if the aggravating circumstances outweigh the mitigating circumstances. In the present case the jury was instructed as follows:

Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these Instructions.

Should you unanimously find that one or more aggravating circumstances existed beyond a

reasonable doubt, you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In the event, the sentence must be imprisonment for life.

(R. 209) (Emphasis added.)

This is consistent with Oklahoma law. In Parks v. State, 651 P.2d 686, 694 (Okla. Crim. App. 1982) it was stated:

As was properly stated in Instruction No. 7, if the jury does not find unanimously beyond a reasonable doubt one or more of the statutory circumstances existed, they would not be authorized to consider the penalty of death, and the sentence would automatically be imprisonment for life.

See also Oklahoma Uniform Jury Instructions (Criminal) 437. Furthermore, under Oklahoma law in effect at that time, the Oklahoma Court of Criminal Appeals conducted a statutorily required

proportionality review, which was considered to be important in another Fifth Circuit case involving Louisiana's capital punishment scheme. Knighon v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984).

The second basis in the Wilson v. Butler, opinion for the court's statement that the jury in Louisiana does not weigh aggravating circumstances and mitigating circumstances is three Louisiana cases. 813 F.2d at 674, n. 36. Perusal of two of the cases, however, reveal that they hold only that a defendant is not entitled to an instruction that the jury should recommend the death sentence only if the aggravating factors outweigh the mitigating factors. See State v. Jones, 474 So.2d 919, 932 (La. 1985); and State v. Welcome, 458 So.2d 1235, 1246-47 (La.

1983). The third case, Sawyer v. State, 442 So.2d 1136, 1137-39 (La. 1983) merely states that nothing in Louisiana's statutory scheme requires that the jury must find the existence of at least one statutorily aggravating circumstance before the defendant can be sentenced to death. Significantly, the court noted that "the finding of statutory aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." (Emphasis original) (footnote omitted). Id. at 1139. Cf. State v. Flowers, 441 So.2d 707, 716-17 (La. 1983) ("[h]aving found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance so found, before

recommending that the sentence of death can be imposed.") (Emphasis added.)

Therefore, contrary to the Fifth Circuit's statement in Wilson v. Butler, under Louisiana law the jury does weigh the aggravating against the mitigating circumstances in capital cases. Williams v. Maggio, 679 F.2d 381, 389 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (en banc opinion involving Louisiana capital case where Fifth Circuit noted that "[w]hen one or more of the statutory aggravating circumstances is found, the jury must balance this against the mitigating circumstances offered by defendant."). For this reason, since the Fifth Circuit has upheld Louisiana death sentences where one of the aggravating circumstances has been found to be invalid, the Fifth Circuit rule is at

odds with the holding of the Tenth Circuit in the present case.

The interchangeability of the words "consider" and "weigh" with regard to a jury's measuring one against the other in deciding whether to impose the death sentence demonstrates that the alleged difference between Georgia, Louisiana, and Oklahoma's death penalty schemes are really distinctions without a difference. Under Georgia law the jury is required to consider "any mitigating circumstances" Ga. Code Ann. § 17-10-30 (1982). Since "[t]he sentencing authority can assign what it deems the appropriate weight to particular mitigating circumstances" Moore v. Balkcom, 716 F.2d 1511, 1521-22 (11th Cir. 1983), supplemented, 722 F.2d 629 (11th Cir. 1984), cert. denied, 465 U.S. 1084

(1984), Georgia juries obviously perform a weighing process. Furthermore, the Constitution would be violated if the sentencer were precluded from considering mitigating circumstances. Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982). Therefore, these juries obviously weigh mitigating circumstances against the aggravating circumstance[s] they have found.

As noted previously, under Oklahoma law the jury in the present case was neither limited by enumerated mitigating circumstances, nor was it required to impose the death sentence upon the finding of one or more aggravating circumstance. Therefore, the alleged invalidity of one aggravating circumstance should not affect the death sentence since another one was found by

the jury. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980) (only one overbroad aggravating circumstance was found by the jury).

CONCLUSION

For the reasons stated, the State respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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No. _____

SUPREME COURT, U.S.
FILED

SEP 21 1987

JOSEPH F. SEANOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

APPENDICES TO THE PETITIONERS'
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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179 P

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIAM THOMAS CARTWRIGHT,)
)
Petitioner-Appellant,)
)
v.) No. 86-1231
)
GARY D. MAYNARD, Warden,)
Oklahoma State Peniten-)
tiary at McAlester,)
Oklahoma,)
)
and)
)
ROBERT H. HENRY, successor)
to MICHAEL J. TURPEN,)
Attorney General of)
Oklahoma,)
)
Respondents-Appellees.)

Appeal from the United States District
Court for the Eastern District of
Oklahoma, D.C. No. 86-54-CIV

Mandy Welch, of Payne and Welch, Hugo,
Oklahoma, for the Petitioner-Appellant.

David W. Lee (Robert H. Henry, Attorney
General, with him on the briefs),
Assistant Attorney General, Oklahoma
City, Oklahoma, for the Respondents-
Appellees.

ON REHEARING EN BANC

Before HOLLOWAY, Chief Judge, BARRETT, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA and BALDOCK, Circuit Judges.

TACHA, Circuit Judge.

Petitioner William Thomas Cartwright appeals from the denial of habeas corpus relief by the United States District Court for the Eastern District of Oklahoma. Cartwright was convicted of the murder of Hugh Riddle and sentenced to death following a determination that the murder satisfied two statutory aggravating circumstances and that these aggravating circumstances outweighed the mitigating evidence. Cartwright alleges that the state of Oklahoma applied the

"especially heinous, atrocious, or cruel" aggravating circumstance in a unconstitutionally vague and overbroad manner in this case. We agree.

Cartwright was tried and convicted of first degree murder for the shooting of Hugh Riddle.¹ The state argued that three of the aggravating circumstances enumerated under Oklahoma law justified the imposition of the death penalty: first, the defendant knowingly created a great risk of death to more than one person; second, the murder was "especially heinous, atrocious, or cruel;" and third, the existence of a probability that the defendant would commit criminal acts of violence that

¹ Cartwright was also convicted of shooting Charma Riddle with intent to kill. He was sentenced to seventy-five years imprisonment for that crime.

would constitute a continuing threat to society. See Okla. Stat. Ann. tit. 21, §§ 701.12(2), (4), (7) (West 1983). The jury concluded that the first two aggravating circumstances were established, but that the evidence did not support the third aggravating circumstance. The jury then weighed the aggravating circumstances and the mitigating circumstances and sentenced Cartwright to death for the murder of Hugh Riddle.

The Oklahoma Court of Criminal Appeals affirmed the convictions and sentences on appeal. Cartwright v. State, 695 P.2d 548 (Okla.Crim.App.), cert. denied, 105 S.Ct. 3538 (1985). The state courts then denied Cartwright's petition for a writ of habeas corpus. A panel of this court affirmed the denial

of the petition. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986). We granted rehearing en banc on the question of the application of the "especially heinous, atrocious, or cruel" aggravating circumstance.²

There are three questions presented in this appeal. First, we must decide whether reliance upon an unconstitutionally vague or overbroad statutory aggravating circumstance requires the reversal of a death sentence

² The previous panel decision disposed of all six of Cartwright's suggested grounds for habeas relief. See Cartwright v. Maynard, 802 F.2d at 1209-22. We do not disturb the decision of the panel regarding five of those issues. We only consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was vague and overbroad in violation of the Eighth and Fourteen Amendments to the Constitution of the United States.

where the sentencer was required to balance the aggravating circumstances with the mitigating circumstances. Second, if such reliance requires that the death sentence be vacated, we must then decide whether the Oklahoma courts in this case applied a constitutionally adequate narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case. Finally, if the state courts failed to apply a proper narrowing construction, we must decide whether this court can apply a narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case.

For the reasons stated in this opinion, we conclude that: (1) reliance upon a constitutionally invalid aggravating circumstance requires that

the death sentence be vacated; (2) the Oklahoma courts failed to apply a constitutionally adequate narrowing construction in this case; and (3) this court cannot decide what narrowing construction is to be applied by the state of Oklahoma. We therefore remand to the district court with directions to enter judgment in accord with this opinion.

I.

Cartwright was sentenced to death after two statutory aggravating circumstances were established. If Cartwright's death sentence can rest on the unchallenged aggravating circumstance of creating a great risk of death to more than one person, we need not reach the constitutional challenge to the "especially heinous, atrocious, or cruel"

aggravating circumstance. See. e.o..
Superintendent, _____ Massachusetts
Correctional Inst. v. Hill. 472 U.S.
445, 450 (1985) (a federal court will
address a constitutional question only
when it is necessary to the resolution of
the case before the court). Thus, we
must first decide whether the
unchallenged aggravating circumstance
supports the death sentence even if the
challenged aggravating circumstance were
found to be invalid.

The validity of a death sentence
based in part on consideration of an
invalid aggravating circumstance "depends
on the function of the jury's finding of
an aggravating circumstance under [a
state's] capital sentencing statute, and
on the reasons that the aggravating
circumstance at issue . . . was found to

be invalid." Zant v. Stephens, 462 U.S. 862, 864 (1983); see also Barclay v. Florida, 463 U.S. 939, 951 (1983); accord Andrews v. Shulsen, 802 F.2d 1256, 1263 (10th Cir. 1986). The Supreme Court has addressed this question under Georgia law in Zant and under Florida law in Barclay and Wainwright v. Goode, 464 U.S. 78 (1984). We are presented with the same question under the law of Oklahoma.

Under the Georgia statute reviewed in Zant, first degree murder is not necessarily a capital offense. The death penalty can be imposed for first degree murder only if at least one statutory aggravating circumstance is established. A statutory aggravating circumstance is used simply to cross the threshold dividing first degree murders that are not eligible for the death penalty and

first degree murders that are eligible for the death penalty. It does not matter how many statutory aggravating circumstances are present -- only one is needed to cross the threshold. Therefore, as long as one valid aggravating circumstance remains, the murder is a capital offense even if other aggravating circumstances are subsequently found invalid.

Moreover, an aggravating circumstance under the Georgia statute is used only to determine which first degree murders are capital offenses. An aggravating circumstance does not play the additional role of guiding the sentencer in the exercise of its statutory discretion in deciding whether to sentence a particular murderer to life imprisonment or to death. No particular aggravating

circumstance is afforded special weight. There is no requirement that aggravating circumstances be balanced against mitigating circumstances. See Zant, 462 U.S. at 873-74.

The Zant Court held that two valid aggravating circumstances served the constitutionally required function of narrowing the class of persons eligible for the death penalty even though a third aggravating circumstance -- that the defendant had "a substantial history of serious assaultive criminal convictions" -- had been held unconstitutionally vague. Id. at 878-79. Once the class of persons eligible for the death penalty has been determined, "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that

class, those defendants who will actually be sentenced to death." Id. at 878 (footnote omitted). The Court then held that the evidence of the defendant's prior criminal record, while not a valid statutory aggravating circumstance, could be considered by the sentencer in selecting the proper punishment. Thus, although the defendant's prior criminal record was improperly considered as a statutory aggravating circumstance, the Court allowed the jury to consider such evidence in deciding whether to impose the death penalty. Labeling the evidence of a prior criminal record as a statutory aggravating circumstance "arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given," but that possibility did not

rise to the level of constitutional error. Id. at 888-89.

The purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in Zant. An aggravating circumstance under the Oklahoma scheme does not establish a threshold that distinguishes capital murders from other first degree murders. In Oklahoma any first degree murder is punishable by life imprisonment or death. Okla. Stat. Ann. tit. 21, § 701.9 (West 1983). Therefore, the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murderers that are eligible for the death penalty. See Zant, 462 U.S. at

875 (Georgia); Andrews, 802 F.2d at 1263 (Utah); Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986) (Louisiana). Cf. Johnson v. Thigpen, 806 F.2d 1243, 1248 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987) (Mississippi).

Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular murder. Okla. Stat. Ann. tit. 21, § 701.10 (West 1983). The sentencer must balance all of the statutory aggravating circumstances with all of the mitigating circumstances. Okla. Stat. Ann. tit. 21, § 701.11 (West 1983). Zant does not determine the effect of consideration of an unconstitutional statutory aggravating circumstance under the Oklahoma statute,

for the Court in Zant carefully observed that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." 462 U.S. at 890; see also id. at 873-74 n. 12.

Florida, like Oklahoma, uses an aggravating circumstance to guide the discretion of the sentencer rather than to define which first degree murders are capital offenses. In this respect the Oklahoma statute is similar to the Florida statute reviewed by the Supreme Court in Barclay and Goode.

Nevertheless, this case differs from Barclay and Goode in two important respects. First, the Oklahoma courts do not reweigh the aggravating and mitigating circumstances after an aggravating circumstance has been found invalid. Second, this case involves an allegation that an aggravating circumstance is invalid under the federal constitution rather than state law.

In Barclay the trial judge found several aggravating circumstances but no mitigating circumstances and sentenced the defendant to death. The State conceded before the Supreme Court that one of the aggravating circumstances relied upon by the state courts--Barclay's criminal record -- was not a statutory aggravating circumstance under state law. Barclay, 463 U.S. at 946. In

cases where no mitigating circumstances were found, the Florida courts had held that the effect of a sentencer's erroneous consideration of an improper aggravating circumstance would be determined by a harmless error analysis. Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), cited in Barclay, 463 U.S. at 955, 966 n.12.

The Supreme Court held that this procedure satisfied the constitutional demand of "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Barclay, 463 U.S. at 958 (plurality opinion of Rehnquist, J., with Burger, C.J., & White & O'Connor, JJ.); id. at 967 (Stevens, J., with Powell, J., concurring in the judgment) (quoting Zant, 462 U.S. at 879)

(emphasis original). Justice Rehnquist wrote that because the aggravating circumstance was invalid only under state law,

[T]his case is distinguishable from Zant v. Stephens . . . where one of the three aggravating circumstances found in Georgia state court was found to be invalid under the Federal Constitution. Of course, a "mere error of state law" is not a denial of due process." Thus we need not apply the type of federal harmless error analysis that was necessary in Zant

Id. at 951 n.8 (citations omitted). The plurality then noted that while state law prohibited a sentencer from considering nonstatutory aggravating circumstances, id. at 954, "nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record." Id. at 956; see also id. at 966-67 (Stevens, J., concurring in the judgment). The plurality concluded that

consideration of an aggravating circumstance invalid under state law did not render the balancing unconstitutional because "[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance."

Id. at 958. Justice Stevens agreed that one valid aggravating circumstance could constitutionally support a death sentence on appeal if no statutory mitigating circumstances had been found. Id. at 967-68.

In Goode, the Supreme Court again considered the application of the Florida statute. One aggravating circumstance had been found invalid under state law in Goode, as in Barclay, but mitigating

circumstances were present in Goode, unlike Barclay. The Florida Supreme Court had indicated that it would perform a harmless error analysis only if there were no mitigating circumstances. See Barclay, 463 U.S. at 954-55. In Goode, on the other hand, the Florida Supreme Court independently rebalanced the valid aggravating circumstances with the mitigating circumstances. The United States Supreme Court recognized that "there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [an invalid aggravating circumstance]." Goode, 464 U.S. at 86-87. Thus, the death sentence was constitutionally permissible.

Two of the elements relied upon in Barclay and Goode are absent in this

case. First, unlike the Florida courts, the Oklahoma courts have been "unwilling to speculate as to the effect the improper aggravating circumstance . . . had on the jury's recommendation to impose the death penalty." Johnson v. State, 665 P.2d 815, 827 (Okla. Crim. App. 1983).³ The Oklahoma Court of Criminal Appeals has held that if an aggravating circumstance used in the balancing by the sentencer is found invalid on appeal, the death penalty must be modified to life imprisonment. Id. The Oklahoma courts have refused to apply a harmless error analysis or to independently reweigh the aggravating and

³ At the time that Cartwright was sentenced, the Oklahoma Court of Criminal Appeals had a statutory obligation to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the

The Oklahoma Court of Criminal Appeals affirmed Cartwright's sentence on January 7, 1985. Cartwright v. State, 695 P.2d at 548. Later that year Oklahoma modified its capital punishment statute to allow for resentencing in the event that a death penalty is set aside on appeal. Okla. Stat. Ann. tit. 21, § 701.13(E)(2) (West Supp. 1986). The Oklahoma court has held that this provision is not to be applied retroactively. Green v. State, 713 P.2d 1032, 1041 n.4 (Okla. Crim. App. 1985), cert. denied, 107 S. Ct. 241 (1986). But see Brewer v. State, 718 P.2d 354, 365-66 (Okla. Crim. App.), (holding that a provision in the 1985 amendments eliminating mandatory proportionality review is to be applied retroactively), cert. denied, 107 S. Ct. 245 (1986). Even if this provision were to be applied retroactively, the need for resentencing if an invalid aggravating circumstance was considered would put Oklahoma squarely in line with the Arkansas procedure described in Collins, 754 F.2d at 267, and would not eliminate the necessity of vacating a death sentence based in whole or in part upon consideration of an unconstitutional aggravating circumstance.

mitigating circumstances. Thus, Oklahoma has no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance.

The Arkansas courts have also concluded that they "are not in a position to speculate about what the jury might have done if it had found only two aggravating circumstances instead of three." Williams v. State, 274 Ark. 9, 12, 621 S.W.2d 686, 687 (Ark. 1981), cert. denied, 459 U.S. 1042 (1982), quoted in Collins v. Lockhart, 754 F.2d 258, 267 (8th Cir.), cert. denied, 106 S. Ct. 546 (1985). In Collins, the Eighth Circuit held that one of the aggravating circumstances relied upon by the Arkansas courts in imposing a death sentence was unconstitutional. The court then considered the effect of this holding in

light of the presence of other valid aggravating circumstances. After examining the statutes at issue in Zant and Barclay, the court concluded:

In Arkansas, the practice is decisively different. Here, unlike Georgia, weighing does take place. . . . Furthermore, unlike the practice in Florida, if an aggravating circumstance is held invalid for any reason, the Supreme Court of Arkansas does not engage in any sort of harmless-error analysis. The death penalty is automatically reduced to life imprisonment, unless the state chooses to retry the question of punishment to a second jury.

Collins, 754 F.2d at 267. The court then held that "[t]he reasoning underlying [Zant v.] Stephens and Barclay is therefore inapplicable here, and the presence of an invalid aggravating circumstance means that the sentence of death cannot stand." Id.

The second difference between this case and Barclay and Goode lies in the

reason that an aggravating circumstance is invalid. The plurality in Barclay emphasized that the particular aggravating circumstance at issue was invalid under state law. Barclay, 463 U.S. at 951 n.8. See also Goode, 464 U.S. at 86. Cartwright alleges that the "especially heinous, atrocious, or cruel" aggravating circumstance violates the federal constitution. We agree that "Zant and Barclay leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances." Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency, 69 Cornell L. Rev. 1129, 1181 (1984).

The Supreme Court's decisions show that the particular function of an aggravating circumstance in a state's capital punishment system determines the effect of reliance upon an unconstitutional aggravating circumstance. An aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer who must decide whether a particular murder merits life imprisonment or death for the defendant. Further, the Oklahoma courts have declined to reconsider that decision on appeal when the sentencer improperly included an invalid aggravating circumstance in the balancing process.⁴

⁴ The Oklahoma Court of Criminal Appeals affirmed Cartwright's sentence on January 7, 1985. Cartwright v. State, 695 P.2d at 548. Later that year Oklahoma modified its capital punishment

In such a system, reliance upon an aggravating circumstance that is invalid under the federal constitution could affect the balance struck by the sentencer. The improper reliance is not corrected by the state appellate review

statute to allow for resentencing in the event that a death penalty is set aside on appeal. Okla. Stat. Ann. tit. 21, § 701.13(E)(2) (West Supp. 1986). The Oklahoma court has held that this provision is not to be applied retroactively. Green v. State, 713 P.2d 1032, 1041 n.4 (Okla. Crim. App. 1985), cert. denied, 107 S. Ct. 241 (1986). But see Brewer v. State, 718 P.2d 354, 365-66 (Okla. Crim. App.), (holding that a provision in the 1985 amendments eliminating mandatory proportionality review is to be applied retroactively), cert. denied, 107 S. Ct. 245 (1986). Even if this provision were to be applied retroactively, the need for resentencing if an invalid aggravating circumstance was considered would put Oklahoma squarely in line with the Arkansas procedure described in Collins, 754 F.2d at 267, and would not eliminate the necessity of vacating a death sentence based in whole or in part upon consideration of an unconstitutional aggravating circumstance.

process and is not a matter of state law beyond the review of a federal court in a habeas corpus proceeding. A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments. We therefore must consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was unconstitutionally vague.

II.

Death is qualitatively different from other punishments that can be imposed by the state. See, e.g., Ford v. Wainwright, 106 S. Ct. 2595, 2603 (1986); California v. Ramos, 463 U.S. 992, 998-999 (1983). This difference necessitates

heightened scrutiny to assure that the capital sentencing decision does not violate the Eighth Amendment prohibition against cruel and unusual punishments. In a constitutional scheme borne of concern for restraining the effect of governmental action on personal life and liberty, the death sentence is the ultimate restraint. We are thus further charged with heightened responsibility for assuring that that restraint is exercised in strict conformity with the requirements of the Constitution. The Supreme Court has consistently demanded that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." California v. Brown, 107 S. Ct. 837, 839 (1987). The Constitution requires us to engraft

objective standards on a sentencing decision so vulnerable to subjective judgments. The difficulty of the task is reflected in the words of Justice Harlan:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

McGautha v. California, 402 U.S. 183, 204 (1971).

We must scrutinize the Oklahoma statutory scheme to determine whether the state has met the constitutional challenge of defining circumstances and terms that deter arbitrary and unpredictable sentencing decisions and provide adequate justification for imposing the death penalty. The question before this court is whether the

application of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance satisfied the requirements of the Constitution in this case. We begin our consideration by examining the constitutional requirement that the discretion of a sentencer in a capital case be carefully guided.

A.

In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court effectively invalidated the capital punishment statutes of the thirty-nine states that provided absolute discretion to the sentencer in choosing the appropriate penalty in a capital case. The Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth

Amendments." Id. at 23940. Three justices concluded that a procedure for imposing the death penalty cannot allow complete and unguided discretion to the sentencer in deciding whether a particular defendant should be sentenced to death or life imprisonment. Id. at 255-57 (Douglas, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 314 (White, J., concurring). The existing procedures for the imposition of capital punishment provided "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Id. at 313 (White, J., concurring).

Thirty-five states quickly enacted new statutes in an attempt to meet the constitutional demands. These statutes followed two different approaches. Some

states sought to eliminate the arbitrary infliction of the death penalty by making the death penalty mandatory for all defendants convicted of first degree murder. Other states sought to channel the discretion of the sentencer by requiring separate guilt and sentencing proceedings, consideration of aggravating and mitigating circumstances, and appellate review of each death sentence.

The Supreme Court decided challenges to death sentences imposed under five of these statutes on July 2, 1976. The Court held that the death penalty is not cruel and unusual punishment per se. Gregg v. Georgia, 428 U.S. 153, 168-87 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id. at 226 (White, J., concurring in the judgment) (citing Roberts v. Louisiana. 428 U.S. 325, 350-

56 (1976) (White, J., with Burger, C.J., Blackmun and Rehnquist, JJ., dissenting)). The Court further found that the Georgia "guided discretion" statute satisfied the Furman mandate "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, JJ.). The statute also "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 206. See also Proffitt v. Florida, 428 U.S. 242 (1976)

(upholding the constitutionality of the Florida guided discretion statute); Jurek v. Texas. 428 U.S. 262 (1976) (upholding the constitutionality of the Texas guided discretion statute). In contrast, the Court in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. at 325, held that the mandatory death penalty statutes of North Carolina and Louisiana were invalid because they failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," and "simply papered over the problem of unguided and unchecked jury discretion." Woodson, 428 U.S. at 302-03 (opinion of Stewart, Powell, and Stevens, JJ.).

As the Supreme Court recently explained:

[O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the judgment as to whether the circumstances of a particular case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McCleskey v. Kemp, 107 S. Ct. 1756, 1774 (1987) (emphasis added).

B.

An aggravating circumstance performs a crucial function in a capital

punishment statute that endeavors to channel the discretion of the sentencer. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984). An aggravating circumstance is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the death penalty. In essence, an aggravating circumstance is a legislative determination that "this murder is different." This difference "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty

of murder." Zant, 462 U.S. at 877 (footnote omitted). A statutorily designated aggravating circumstance accomplishes this by "identify[ing] special indicia of blameworthiness or dangerousness in the killing." Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305, 329 (1983). Thus, "the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." Gregg, 428 U.S. at 192 (opinion of Stewart, Powell, and Stevens, JJ.).

The narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination. Thus, aggravating circumstances must be described in terms

that are commonly understood, interpreted and applied. To truly provide guidance to a sentencer who must distinguish between murders, an aggravating circumstance must direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. Many aggravating circumstances require distinctions among murders that are relatively easy for a sentencer to make: more than one person was killed by the acts of the defendant, Ky. Rev. Stat. § 532.025(2)(a) (6) (Michie/Bobbs-Merrill Supp. 1986); the victim was pregnant, Del. Code. Ann. tit. 11, § 4209(e)(1) (p) (Supp. 1986); or the murder was committed by a hidden explosive device. Cal. Penal Code § 190.2(a) (4) (West Supp. 1987).

The Supreme Court has warned, however, that a standard could be so vague that it would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." Zant, 462 U.S. at 877 (quoting Gregg, 428 U.S. at 195 n.46). Thus, if "an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibilities to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." Rosen, The "Especially Heinous" Aggravating

Circumstance in Capital Cases -- The Standardless Standard. 64 N.C.L. Rev. 941, 954 (1986) [hereinafter The Standardless Standard] (footnote omitted).

C.

The Oklahoma capital punishment statute includes as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, or cruel." Okla. Stat. Ann. tit. 21, § 701.12(4) (West 1983). Twenty-three other states have a similar aggravating circumstance, using such terms as "outrageously or wantonly vile," "heinous," "horrible," "brutal," "depraved," "cruel," "inhuman," and "atrocious" to describe a particularly offensive crime. See Rosen, The Standardless Standard. 64 N.C.L. Rev. at 943 n.7. Although the Supreme

Court has not held such language to be facially unconstitutional, the Court has "not stopped at the face of a statute, but [has] probed the application of statutes to particular cases." McCleskey, 107 S. Ct. at 1773. A state court interpretation of the statutory language of an aggravating circumstance can be "so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion." Id.

Cartwright alleges that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was applied in an unconstitutionally vague and overbroad manner in this case. In deciding this claim, we first review the Supreme Court decisions involving challenges to statutory provisions similar to the

"especially heinous, atrocious, or cruel" aggravating circumstance at issue in this case. We then turn to the evolution of the meaning of "especially heinous, atrocious, or cruel" as construed by the Oklahoma Court of Criminal Appeals. Finally, we determine whether that court's application of the aggravating circumstance in this case satisfies the demands of the United States Constitution.

The Supreme Court first considered challenges to this type of aggravating circumstance in Gregg and Proffitt. Although the murder in Gregg had not been found to satisfy the aggravating circumstance that the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated

battery to the victim," see Ga. Code Ann. § 17-10-30(b) (7) (1982), the petitioner asserted that the alleged vagueness of that provision rendered the entire Georgia statutory sentencing procedure unconstitutional. The Supreme Court disagreed, recognizing that it is "arguable that any murder involves depravity of mind or an aggravated battery," but concluding that "this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Gregg, 428 U.S. at 201 (opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted). In Proffitt, the trial judge found that the murder was "especially heinous, atrocious, or cruel." See Fla. Stat. Ann. § 921.141(5)

(h) (West 1985). The Florida courts had construed that provision to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The Supreme Court held that by so limiting the statutory description, the state provided adequate guidance to the sentencer. Proffitt, 428 U.S. at 255-56.

The Supreme Court reviewed the Georgia courts' application of the aggravating circumstance in Godfrey v. Georgia, 446 U.S. 420 (1980). Justice Stewart observed:

[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. . . . It must channel the sentencer's discretion

by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

Id. at 428 (plurality opinion of Stewart, J., with Blackmun, Powell, and Stevens, JJ.) (footnotes and citations omitted). See also id. at 433 (Marshall, J., with Brennan, J., concurring in the judgment) (reiterating their belief that "the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.") The jury had found only that the offense was "outrageously or wantonly vile, horrible and inhuman." Id. at 428 (footnote omitted). Because "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence . . . the jury's

interpretation of [the aggravating circumstance] can only be the subject of sheer speculation." Id. at 428-29.

The plurality also found that the jury's uncontrolled discretion was not cured on appeal in the state courts. While in cases preceding Godfrey the Georgia Supreme Court had applied a narrowing construction of the statutory provision, in Godfrey the state court simply asserted that the verdict was 'factually substantiated.'" Id. at 432. Therefore, the plurality considered "whether, in light of the facts and circumstances of the murders . . . the Georgia Supreme Court can be said to have applied a constitutional construction" of the statutory phrase. Id. The plurality concluded that "[t]here is no principled way to distinguish this case, in which

the death penalty was imposed, from the many cases in which it was not." Id. at 433. Accordingly, the Court reversed the sentence of death.

The Oklahoma Court of Criminal Appeals has reviewed almost thirty cases in which the death penalty was imposed after the jury concluded that a murder was "especially heinous, atrocious, or cruel." The court originally held that this aggravating circumstance must be applied according to the narrowing construction approved in Proffitt, but Oklahoma has since abandoned that construction.

In Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), rev'd on other grounds sub nom. Eddings v. Oklahoma, 455 U.S. 104 (1982), the Oklahoma Court of Criminal Appeals considered the

"especially heinous, atrocious, or cruel" provision for the first time. The court recognized that "[t]he aggravating circumstance in the statute is for murders that are especially heinous, atrocious and cruel, and obviously the Legislature must have intended to reach killings which are 'out of the ordinary.'" Id. at 1167 (emphasis original). The court then quoted the following passage from the narrowing construction of the Florida court that the Supreme Court had approved in Proffitt:

"[W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of

others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

Eddings. 616 P.2d at 1167-68 (quoting Dixon. 283 So.2d at 9). The court concluded that the killing of a police officer in the performance of his duties satisfied this standard,⁵ and that the

⁵ The United States Supreme Court vacated the death sentence in Eddings because the state court had failed to consider evidence of the defendant's unhappy upbringing and emotional disturbance as a mitigating factor. Eddings v. Oklahoma, 455 U.S. 104, 113-17 (1982). The Court also noted in dicta that the state court had held that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel." In response, the Court said, "we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in Godfrey." Id. at 109 n.4.

testimony at trial regarding the defendant's manner indicated that the killing was "'designed to inflict a high degree of pain with utter indifference to . . . the suffering of others.'" Eddings, 616 P.2d at 1168 (quoting Dixon, 283 So.2d at 9).

Since Eddings, the Oklahoma court has consistently followed that part of the narrowing construction approved in Proffitt providing that "'heinous' means 'extremely wicked or shockingly evil'. 'atrocious' means 'outrageously wicked and vile'; and 'cruel' imports a design to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.'" Brooie v. State, 695 P.2d 538, 542 (Okla. Crim. App. 1985) (quoting Stafford v. State, 665 P.2d 1205, 1217 (Okla. Crim. App.

1983), vacated on other grounds, 467 U.S. 1212 (1984)). The court has frequently approved jury instructions using this language. See, e.g., Davis v. State, 665 P.2d 1186, 1202 (Okla. Crim. App.), cert. denied, 464 U.S. 865 (1983); Burrows v. State, 640 P.2d 533, 542 (Okla. Crim. App. 1982), cert. denied, 460 U.S. 1011 (1983); Chaney v. State, 612 P.2d 269, 280 (Okla. Crim. App. 1980), cert. denied, 450 U.S. 1025 (1981).

The court has also quoted the passage in Eddings -- originally approved in Proffitt, that limits this aggravating circumstance to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Nuckols v. State, 690 P.2d 463, 471-73 (Okla. Crim. App. 1984), cert. denied, 471 U.S. 1030

(1985); Boutwell v. State, 659 P.2d 322, 329 (Okla. Crim. App. 1983); Burrows, 640 P.2d at 542.⁶ The Oklahoma Court of Criminal Appeals has never held that this.

⁶ The uniform jury instruction which defines "heinous, atrocious, or cruel" provides:

As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

Okla. Uniform Jury Instruction Cr. No. 436. This instruction has been used on occasion. See, e.g., State v. Liles, No. CRF-82-4268 (Okla. County Dist. Ct. May 18, 1983) (Instruction No. 3), aff'd, 702 P.2d 1025 (Okla. Crim. App. 1985), cert. denied, 106 S. Ct. 2291 (1986), quoted in Supplement to Record, Mar. 3, 1987, at 4.

language is mandatory, however, thus rejecting part of the narrowing construction approved in Proffitt and seemingly adopted in Eddings. In Irvin v. State, 617 P.2d 588, 598-99 (Okla. Crim. App. 1980), the court held that it was not mandatory to include the "unnecessarily torturous to the victim" language in the instructions to the jury. Three years later, in Davis, 665 P.2d at 1202-03, the court rejected the argument that a substantial amount of torture must precede the killing for a murder to be "especially heinous, atrocious, and cruel." Then, in Nuckols, the court held:

[Our] cases make clear that suffering of the victim is not the major factor we consider regarding this aggravating circumstance. . . . [T]he "manner of the killing" is a relevant consideration, as well as the circumstances surrounding the homicide. We also have examined the killer's attitude

to learn if it was especially pitiless or cold.

690 P.2d at 472 (citations omitted). The court concluded that "both the circumstances leading up to, and the manner in which the homicide was committed, [are] sufficiently atrocious to be at the 'core' of the circumstance." Id. at 472-73.

The Oklahoma Court of Criminal Appeals then decided Cartwright's appeal in this case. The jury at Cartwright's trial had been instructed that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." On appeal the court noted that the statute is written in disjunctive

language -- the murder must be especially heinous, atrocious, or cruel -- so a murder need only fall within one of these terms as defined by the court. Cartwright v. State. 695 P.2d at 554. The court then held that while torture is sufficient to satisfy this aggravating circumstance, it is not necessary. Id. The court described some of the factors that had supported this aggravating circumstance in previous cases: the defendant knew the victim and planned the murder well in advance, Boutwell, 659 P.2d at 329; the defendant shot his victims several times, Davis, 665 P.2d at 1202-03; the defendant shot three persons in a barroom for no apparent reason, Jones v. State, 648 P.2d 1251, 1259 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1983); and the defendant

kidnapped two women, demanded \$500,000 in ransom, and murdered and buried the women. Chaney, 612 P.2d at 280, 282.

The court wrote:

Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder. including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by

disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. See as well our discussion in Nuckols v. State, 690 P.2d 463, 55 O.B.A.J. 2259 (Okl. Cr. 1984), of the consideration to be given to the manner of a killing in determining whether a murder is heinous, atrocious or cruel.

Cartwright v. State, 695 P.2d at 554 (emphasis added).

The construction of "especially heinous, atrocious, or cruel" employed by the Oklahoma Court of Criminal Appeals in this case is a departure from the construction initially adopted in Eddings. The court no longer limits this aggravating circumstance to murders that are "unnecessarily torturous to the victim," one of the standards adopted in Eddings and previously approved by the

Supreme Court in Proffitt. The court now relies upon the definitions of the terms "heinous," "atrocious," and "cruel," and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder. We must decide whether this construction serves to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. at 428 (footnotes omitted).

Oklahoma has defined "heinous" as "extremely wicked or shockingly evil" and "atrocious" as "outrageously wicked and vile." These definitions fail for the same reason that the conclusory statement

that the offense was "outrageously wicked and vile, horrible and inhuman" was inadequate in Godfrey: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428. A limiting construction of this aggravating circumstance is necessary precisely because adjectives such as "wicked" or "vile" can fairly be used to describe any murder. These terms simply elude objective definition. A state does not channel the discretion of a sentencer or distinguish among murders when "heinous" and "atrocious" are defined only as "extremely wicked and shocking" and "outrageously wicked and vile." "Heinous" and "atrocious" have not been described in terms that are commonly understood,

interpreted, and applied. Vague terms do not suddenly become clear when they are defined by reference to other vague terms.

The definition of "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others" is somewhat more precise, but there are two reasons why this definition does not now serve as an adequate standard. First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance. See Nuckols, 690 P.2d at 472; see also Green v. State, 713 P.2d 1032, 1044 (Okla. Crim. App. 1985), cert. denied, 107 S. Ct. 241 (1986). Second, because the Oklahoma court has emphasized

that a murder need only be especially heinous, atrocious, or cruel, see Cartwright v. State, 695 P.2d at 544, even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance. The court no longer limits the application of the "especially heinous, atrocious, or cruel" aggravating circumstance to those crimes that are "unnecessarily torturous to the victim." See id.

According to the state, the terms "heinous," "atrocious," and "cruel," coupled with their definitions, direct the attention of the sentencer to the manner of the killing and the attitude of

the killer. Transcript of oral argument at 19. The Oklahoma court has said that the attitude of the killer, the manner of the killing, the suffering of the victim, and all of the circumstances of the offense are relevant considerations in determining whether a murder was "especially heinous, atrocious, or cruel." See Nuckols, 690 P.2d at 472; see also Liles v. State, 702 P.2d 1025, 1032 (Okla. Crim. App. 1985), cert. denied, 106 S. Ct. 2291 (1986). We examine each factor in turn.

In several cases the Oklahoma court has cited the killer's "conscienceless" or "pitiless" attitude or indifference to the suffering of the victim in supporting a finding that a murder was "especially heinous, atrocious, or cruel." See, e.g., Green, 713 P.2d at 1044-45; Cooks v.

State, 699 P.2d 653, 661 (Okla. Crim. App.), cert. denied, 106 S. Ct. 268 (1985); Boutwell, 659 P.2d at 329; Jones, 648 P.2d at 1259. But as the court has recognized, the attitude of the killer is best evidenced by what the killer has done. See Green, 713 P.2d at 1044-45. See also Nuckols, 690 P.2d at 473 ("the circumstances of this killing, coupled with appellant's comments . . . reveal this crime was shockingly pitiless"). Thus, the inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense.

"[T]he manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty." Chaney, 612 P.2d at 280. The

unanswered question, however, is what manner of killing makes a murder "especially heinous, atrocious, or cruel." The Oklahoma court has never explained why one manner of killing is "especially heinous, atrocious, or cruel" and why another manner of killing is not. The cases in which the court has found the manner of the killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed. See, e.g., Green, 713 P.2d at 1035 (defendant stabbed an inmate seventeen times in the chest and the back with a butcher knife and slashed in the throat); Cooks, 699 P.2d at 656 (defendant raped, beat, and suffocated an 87-year-old disabled woman); Nuckols, 690 P.2d at 465, 472-73 (defendant struck the victim with a ball

peen hammer and kicked him repeatedly); Jones, 648 P.2d at 1253-54 (defendant repeatedly shot three persons in a bar). But see Odum v. State, 651 P.2d 703, 707 (Okla. Crim. App. 1982) ("the manner of killing cannot be said to lie at the 'core' of the statutory aggravating circumstance" where the defendant shot the victim once in the neck and rendered him unconscious immediately). Further, the Oklahoma court has held a torture murder is not the only kind that is "especially heinous, atrocious, or cruel." See Cartwright v. State, 695 P.2d at 554. The court has not identified which manners of killing are not "especially heinous, atrocious, or cruel." Therefore, the court's reliance upon the manner of the killing does not serve to distinguish among those murders

that are punishable by death and those that are not.

The suffering of the victim has been relied upon in several instances in which this aggravating circumstance was found. See, e.g., Liles, 702 P.2d at 1032; Stafford, 665 P.2d at 1217; Burrows, 640 P.2d at 543. On one occasion, the absence of any suffering by the victim led the state appeals court to reverse a finding that a murder was "especially heinous, atrocious, or cruel." Odum, 651 P.2d at 707. Nonetheless, the court has held that it is not necessary for the victim to have suffered for a murder to satisfy this aggravating circumstance. See Nuckols, 690 P.2d at 472. Suffering is sufficient but not required.

The Oklahoma Court of Criminal Appeals, then, has said that the attitude

of the killer, the manner of the killing, or the suffering of the victim can support this aggravating circumstance, but the court has refused to hold that any one of those factors must be present for a murder to satisfy this aggravating circumstance. The underlying position of the Oklahoma court appears to be that it can simply review the circumstances of the murder and divine whether the murder was "especially heinous, atrocious, or cruel." See Cartwright v. State, 695 P.2d at 554; see also Nuckols, 690 P.2d at 472, quoted in Green, 713 P.2d at 1044. In numerous cases the court has affirmed a finding that a murder was "especially heinous, atrocious, or cruel" with no more than a statement that "the facts adequately support" the aggravating circumstance. Ake v. State, 663 P.2d 1,

11 (Okla. Crim. App. 1983), rev'd on other grounds, 470 U.S. 68 (1985). See also, e.g., Coleman v. State, 668 P.2d 1126, 1138 (Okla. Crim. App. 1983), cert. denied, 464 U.S. 1073 (1984); Hays v. State, 617 P.2d 223, 231-32 (Okla. Crim. App. 1980).

We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous,

atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheer speculation." Godfrey, 428 U.S. at 429. Indeed, courts that have considered similar aggravating circumstances have held:

[A murder] can be especially heinous because the victim is too young, too old, or because the defendant chose his victims so that they were not too young or too old. If the defendant killed for no reason, the murder is especially heinous, as is a murder committed for a reason the appellate court does not like. A killing is especially heinous if the victim is aware of the impending death, and also if the killing is done without warning.

Rosen, The Standardless Standard. 64 N.C.L. Rev. at 989 (footnotes omitted). The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in

Furman. No objective standards limit that discretion.

In this case the court described the events surrounding the murder including the petitioner's motive for the murder, the preparation for the attack, the attack itself, and the petitioner's efforts to conceal his activities. The court then held that these events "adequately supported the jury's finding." Cartwright v. State, 695 P.2d at 554. This conclusion is no different than the finding that the verdict was "factually substantiated" that was held inadequate in Godfrey. 446 U.S. at 419. We therefore hold that the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of "especially heinous, atrocious, or cruel" in this case.

III.

The question remains whether this court can sua sponte adopt a constitutionally permissible narrowing construction of "especially heinous, atrocious, or cruel" and apply that construction to the facts of this case.

In Godfrey, the plurality characterized the failure of the state court to apply a proper narrowing construction as an aberrational lapse. 446 U.S. at 430-32. But see id. at 435-36 (Marshall, J., concurring in the judgment) (arguing that the Georgia court had either abandoned or consistently broadened its previous narrowing construction of the statutory provision). The plurality then applied the narrowing construction usually employed by the Georgia court to the facts of the murders

in that case. The Oklahoma court, on the other hand, has now explicitly denied the necessity of finding that a murder was "unnecessarily torturous to the victim." Compare Cartwright v. State, 695 P.2d at 554 (torture is sufficient but not necessary) with Eddings, 616 P.2d at 1168. ("What is intended [is] the conscienceless or pitiless crime which is unnecessarily torturous to the victim.") The Oklahoma court has also rejected the argument that the suffering of the victim is the primary factor to be considered in deciding whether this aggravating circumstance can be applied to a particular murder. See Nuckols, 690 P.2d at 472; Green, 713 P.2d at 1044. The remaining "standards" advanced by the Oklahoma court are unconstitutionally vague. Therefore, unlike the Court in

Godfrey, there is no constitutionally adequate narrowing construction adopted by the state courts that we can apply to the instant case.

We do not decide what narrowing construction of the "especially heinous, atrocious, or cruel" aggravating circumstance would satisfy the constitutional requirements. That determination must be made by the state in the first instance as it construes its own laws in light of constitutional requirements. The Supreme Court has pointedly declined the opportunity "to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision." Ramos, 463 U.S. at 999 (emphasis original). The Ramos Court concluded:

It would be erroneous to suggest, however, that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate. In Gregg itself the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in Furman.

. . .

Beyond these limitations, as noted above, the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.

Id. at 1000-01.

We have held that the construction of the "especially heinous, atrocious, or cruel" aggravating circumstance applied by the Oklahoma Court of Criminal Appeals in this case is unconstitutionally vague. We will not presume to specify "the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to

the sentencing decision." Id. at 1000 (emphasis original) (quoting Gregg, 428 U.S. at 192).

IV.

We make no judgment as to whether the attack in this case was "especially heinous, atrocious, or cruel." We hold only that the Oklahoma courts failed to guide the sentencer's discretion with constitutionally adequate standards.

The order of the District Court for the Eastern District of Oklahoma is affirmed with respect to the denial of the writ but reversed with respect to its denial of all further relief. The case is remanded to the district court with directions to enter judgment that the writ of habeas corpus is denied but, as

law and justice require,⁷ the death sentence of petitioner is invalid under the Eighth and Fourteenth Amendments to the United States Constitution. The execution of the petitioner under this invalid death sentence is enjoined. This judgment is without prejudice to further proceedings by the state for redetermination of the sentence on the conviction.⁸

⁷ The federal habeas statute empowers the federal courts to make disposition of the matter "as law and justice require." 28 U.S.C. § 2243; Carafas v. LaVallee, 391 U.S. 234, 239 (1968); Chaney v. Brown, 730 F.2d 1334, 1358 (10th Cir.), cert. denied, 469 U.S. 1090 (1984).

⁸ We express no opinion concerning the constitutionality of a retroactive application of Oklahoma's new remand procedure. See Dutton v. Brown, 812 F.2d 593, 602 n.10 (10th Cir. 1987) (en banc), petition for cert. filed, 55 U.S.L.W. 3747 (U.S. May 5, 1987).

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

APPENDIX B

APPENDIX B
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT,)		
)	
Petitioner,)		
)	
-vs-	)	No. 86-54-C
)	
GARY D. MAYNARD, Warden,)		
Oklahoma State Penitentiary))		
at McAlester, Oklahoma,)		
)	
Respondent,)		
)	
and)		
)	
MICHAEL C. TURPEN,)		
Attorney General for)		
Oklahoma,)		
)	
Additional Respondent.)		

ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS AND DENYING PETITIONER'S
APPLICATION FOR STAY OF EXECUTION

This is a proceeding for writ of habeas corpus by the above-named petitioner, who is a state prisoner incarcerated at the Oklahoma State Penitentiary at McAlester, Oklahoma.

Petitioner claims that his detention pursuant to the judgment and sentence of the District Court of Muskogee County, State of Oklahoma, in Case No. CRF-82-192, is unlawful. After trial by jury on November 12, 1982, for the offense of Murder in the First Degree, and a second count of Shooting with Intent to Kill, petitioner was sentenced to death by lethal injection on the murder count conviction and sentenced to serve a 75-year sentence for the offense of Shooting with Intent to Kill.

As ground for relief, petitioner sets forth five allegations of error, which the Court has summarized as follows:

I. Petitioner's pre-trial request for a complete psychological evaluation was improperly denied by the trial court.

II. The death penalty as applied to the petitioner, Cartwright, is

cruel and unusual punishment and forbidden by the Eighth Amendment to the Constitution of the United States.

III. The trial court's method and procedure of selecting jurors violated petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution.

IV. Petitioner was denied effective assistance of counsel, in violation of his Sixth and Fourteenth Amendment rights under the United States Constitution.

V. The state trial court violated Petitioner's right to due process by summarily denying petitioner's application for post-conviction relief.

Petitioner appealed his conviction in Case No. CRF-82-192 to the Oklahoma Court of Criminal Appeals, which affirmed the conviction at Cartwright v. State, 695 P.2d 548, (Okla. Cr. 1985). The United States Supreme Court denied certiorari in Case No. 84-67-14 on July 1, 1985. This Court, on August 19, 1985, dismissed a habeas corpus action filed by petitioner

for failure to exhaust state remedies in Case No. 85-513. Thereafter, petitioner filed a request for post-conviction relief before the District Court of Muskogee County, raising essentially the same issues that are now before the Court. The request for post-conviction relief was denied by the state trial court on August 22, 1985, and the trial court's denial was affirmed by the Oklahoma Court of Criminal Appeals on October 23, 1985, in Cartwright v. State, 708 P.2d 592 (Okla. CR 1985).

The Respondent has filed a response by and through the Attorney General of the State of Oklahoma. Included with the Attorney General's Response was a complete trial transcript of Case No. CRF-82-192, transcript of pre-trial motions, sentencing transcript, and the

transcript of the state court post-conviction proceedings. The Respondent and Petitioner agree that all state court remedies have been exhausted.

The Court has carefully scrutinized the following: (1) the petition for habeas corpus relief; (2) the Response filed on behalf of the Respondent; (3) the entire transcript of the trial proceedings, including the motion hearings, the jury voir dire and the sentencing; (4) the transcript of the post-conviction proceedings; (5) the opinion of the Oklahoma Court of Criminal Appeals, affirming the court on the trial and affirming the denial of post-conviction relief. Therefore, the Court, for the reasons set forth below, has determined that an evidentiary hearing is not necessary or required to resolve the

issues raised in this matter.

The United States Supreme Court has stated that federal courts must grant an evidentiary hearing to a habeas corpus applicant if: (1) the merits of a factual dispute were not resolved in a state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the finding procedure in state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed at state court hearings; or (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing. Townsend v. Sain, 372 U.S. 293, 313 (1963).

The records and transcripts before

this court conclusively establish that the state fact finding procedures were more than adequate to afford a full and fair hearing, that the state trier of fact did afford the applicant a full and fair fact hearing, and that all necessary material facts were adequately developed at the state court hearings. Moreover, the record and transcripts establish beyond doubt that the merits of all factual disputes were resolved in the state hearings, and that the state factual determinations are sufficiently supported by the record as a whole.

Accordingly, the Court finds that the record and transcripts of the state court proceedings provide all the necessary data for a satisfactory determination of the issues raised in the petition, and an evidentiary hearing is not required.

Townsend v. Sain, supra, at 318; Sumner v. Mata, 449 U.S. 530 (1981) (Sumner I), Sumner v. Mata, U.S. 591 (1982) (Sumner II).

As stated above, each and every issue raised in the petition has been previously raised and fully addressed during the trial and/or the post-conviction proceeding, as well as during either or both of the appeals resulting from those trial court proceedings.

The law applicable to the issues has been exhaustively discussed and treated in the state proceedings, and the briefs submitted by the petitioner and respondents.

Petitioner's propositions will be treated separately, except where indicated otherwise.

PROPOSITION I

**PETITIONER'S PRE-TRIAL REQUEST FOR
A COMPLETE PSYCHOLOGICAL EVALUATION
WAS IMPROPERLY DENIED BY THE TRIAL
COURT.**

Petitioner relies almost exclusively on Ake v. Oklahoma, 470 U.S. _____, 105 S.Ct. 1087 (1985), to support his contention that he was denied his basic constitutional rights when the trial court refused to grant his request for a complete psychological evaluation at State expense. After reviewing all the records and transcripts before the Court, it is clear that the facts in the case at bar are distinguishable from those found in the Ake case. This Court agrees with the Oklahoma Court of Criminal Appeals analysis of the Ake case, Cartwright v. State, 708 P.2d 592 (Okla. CR 1985), where that Court stated:

"In Ake, the Supreme Court applied

the standards discussed in its decisions to the facts, and concluded that Ake's sanity was likely to be a significant factor in his defense:

'For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment just four months after the offense, was so bizarre as to prompt the trial judge, sua sponte, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that his mental illness might have begun many years earlier. Ap. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant. Ake, at 470 U.S. _____, 105 S.Ct. at 1098, 84 L.E.2d at 68.'

"In contrast, the petitioner did not use the insanity defense, he did not display any bizarre

behavior, an examination by the state psychiatrist showed that he was competent to stand trial and was able to assist in his defense, and finally stated that further observation was unnecessary. Although the petitioner complained of recurring blackouts, a physician who examined him three days after the crimes could not find anything abnormal even though his attention was specifically called to the 'soft spot' on the petitioner's head alleged to be the reason the blackouts occurred."

The facts of the instant case do not indicate that petitioner, Carwright's, sanity was a viable issue upon which he could have based his defense. To the contrary, the evidence of record establishes a strong factual basis for the trial court's refusal to grant petitioner's request for further psychological evaluation.

PROPOSITION II

THE DEATH PENALTY AS APPLIED TO THE PETITIONER, CARTWRIGHT, IS CRUEL AND UNUSUAL PUNISHMENT AND FORBIDDEN BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's claim that the death penalty is per se cruel and unusual

punishment in violation of the Eighth and Fourteenth Amendments to the Constitution has no merit. Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976).

Petitioner's further contention that the trial court failed to adequately instruct the jury is not supported by the record. To the contrary, the trial court gave instructions that have been approved and sanctioned by the courts in Proffitt, supra, and Davis v. State, 665 P.2d 1186 (Okla. CR 1983).

Further, this Court has reviewed the Oklahoma Statutes, 21 O.S. § 701.7-701.15, implemented to overcome the constitutional problems outlined in Furman v. Georgia, 408 U.S. 238 (1972), as well as the case law applying said statutes, and finds that the statutes

have been uniformly applied by the Oklahoma courts. Cartwright v. State, 708 P.2d 592 (Okla. CR 1985).

In regard to Godfrey v. Georgia, 446 U.S. 420 (1980) cited by petitioner, this Court has reviewed that case and determined that the Supreme Court was called upon to address a narrow issue involving a Georgia death penalty statute that contained language clearly distinguishable from the Oklahoma Statutes.

PROPOSITION III

THE TRIAL COURT'S METHOD AND PROCEDURE OF SELECTING JURORS VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

This Court's review of the voir dire of the jurors and panel for petitioner's case indicate to this Court that the state trial court did meet the standards

set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844, 83 L.E.2d 841 (1985).

In Patton v. Yount, ___ U.S. ___, 104 S.Ct. 2885 (1984), Wainwright, supra, the Court held that whether jurors have opinions that disqualify them is a question of fact to be determined by the state trial court. Further, the Court in Patton stated in holding that the trial court's decision as to the qualification of jurors was entitled to a presumption of correctness that:

"There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only after an often extended voir dire proceeding designed specifically to identify biased veniremen. It is fair to assume that the method we have relied on since the beginning, e.g., United States v. Burr, 25 F.Cas. 49, 51

(CCD Va. 1807) (Marshall, C.J.), usually identifies bias. Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference'. E.g., Bose Corp. v. Consumers Union of U.S., Inc., U.S. ___, ___ (1984). The respect paid such findings in a habeas proceeding certainly should be no less."

The Court finds therefore that the petitioner, in this proposition, failed to raise an error which amounted to deprivation of a constitutional right.

PROPOSITION IV

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION."

Petitioner's claim of ineffective assistance of counsel is without merit. The record before the Court indicates that petitioner's trial counsel in

representing petitioner filed a Motion to Suppress Evidence, Motion for Severance, Motion for Psychological Evaluation and Motion to Change Venue, which resulted in the case being tried in another county, rather than the county where the alleged murder took place. In addition, the trial record reflects that the defense counsel effectively cross-examined prosecution witnesses, demurred to the evidence of the State and called thirteen witnesses on behalf of the petitioner during the course of the trial. This Court finds that the conduct of petitioner's court-appointed counsel can be very favorably compared to the defense attorney in United States vs. Fitts, 576 F.2d 837, 339 (10th Cir. 1978), where the Court stated:

"The record reflects that counsel conducted the defense in an acceptable manner. He challenged testimony of the government witnesses on cross-examination, interposed appropriate objections, called and adequately examined a defense witness to refute the incriminating testimony of Jost and presented arguments which demonstrated his knowledge of the law and facts in this case."

The burden on the petitioner to establish a claim of ineffective assistance of counsel is great and neither hindsight nor success is a proper standard for determining counsel's effectiveness, Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir. 1970). Further, the Supreme Court in Strickland v. Washington, _____ U.S. _____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), held in commenting on the burden of the petitioner that:

"First the defendant must show that counsel's performance was deficient. This requires showing

that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

The Court, in Strickland, also stated that:

"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencers-including an appellate court, to the extent that it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

PROPOSITION V

THE STATE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY SUMMARILY DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF.

In this proposition the petitioner

has failed to state facts which raise a federal constitutional question. The Oklahoma post-conviction procedure is a matter of state law and generally the interpretation of a state statute by the highest court of the state will be followed by the federal courts. Tyrrell v. Crouse, 422 F.2d 852 (10th Cir. 1970), Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968). In this matter, the Court notes that the highest court of the state did, at Cartwright v. State of Oklahoma, 708 P.2d 592 (Okla. Cr. 1985), uphold the trial court's denial of postconviction relief. Further, even on matters dealing with direct appeal case law clearly indicates as stated in McInnes v. Anderson, 366 F.Supp. 983, 986 (E.D. Okla. 1973) that:

"A state is not required by the Federal constitution to provide an

appellate review of a criminal file. Griffin V. Illinois, supra. If it provides for an appeal it may do so in the manner and on the same terms which it deems proper."

In an analogous situation, the Tenth Circuit Court of Appeals in Snow v. Oklahoma, 489 F.2d 278 (10th Cir. 1973) held that there is no federal constitutional right to a preliminary hearing. See also Bond v. Oklahoma, 546 F.2d 1369 (10th Cir. 1976) and Brinlee v. Crisp, 608 F.2d 839 (10th Cir. 1979) cert. denied 444 U.S. 1047 (1980).

Accordingly, the petition for writ of habeas corpus and request for stay of execution is denied.

Dated this ____ day of February, 1986.

United States District
Judge

APPENDIX C

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE
STATE OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT,)	
)	
Appellant,)	
)	
v.	)	No. PC-85-594
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

**ORDER DENYING APPLICATION FOR
POST-CONVICTION RELIEF
AND AFFIRMING DEATH SENTENCE**

The petitioner, William Thomas Cartwright, has appealed from the denial on August 22, 1985, of post-conviction relief by the District Court of Muskogee County in Case No. CRF-82-192. We affirm the district court's denial of post-conviction relief, and affirm the sentence of death.

On October 25, 1982, the petitioner was sentenced to death by lethal drug

injection for the offense of Murder in the First Degree, and on November 12, 1982, he was sentenced to seventy-five years' imprisonment for the offense of Shooting With Intent to Kill. After an appeal to this Court, we affirmed the convictions and sentences, Cartwright v. State, 695 P.2d 548 (Okl.Cr. 1985), and the Supreme Court of the United States denied the petition for writ of certiorari, Cartwright v. Oklahoma, ____ U.S. ____, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985).

The petitioner raises thirteen assignments of error, ten of which the district court ruled were raised, or could have been raised on direct appeal. We have consistently held that 22 O.S. 1981, § 1086 bars the assertion of alleged errors which could have been

raised on direct appeal, but were not. Ellington v. Crisp, 547 P.2d 391 (Okla. Cr. 1976). Therefore, we will not address those assignments of error.

Two assignments of error were raised twice, using different methods to present them. Those assignments of error are (1) that trial counsel was ineffective, and (2) that the trial court erred in failing to appoint a psychiatrist or psychologist to examine the petitioner when defense counsel requested psychological evaluation. In his first method of raising these issues he asserts that they should have been raised on direct appeal, and that failure to do so, resulted in ineffective assistance of appellate counsel.

The Supreme Court of the United States has held that, "A first appeal as of

right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. ___, ___, 105 S.Ct. 830, 836, 83 L.Ed.2d 821, 830 (1985). The Court stated that appellate counsel must be available to assist in preparing and submitting a brief to the appellate court, and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. Counsel is not required to advance every argument, regardless of merit. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

The fact that petitioner's appellate counsel did not raise the two assignments of error which we noted, does not lead to

the conclusion that he was ineffective. The basic test for ineffectiveness of trial counsel is: "Whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

Strickland v. Washington, 466 U.S. ___, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692-693 (1984). The proper standard as set forth in that case is "reasonably effective assistance." It further speaks of the necessity of a reviewing court indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and that a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." These same standards are applicable to appellate counsel.

The petitioner in his direct appeal was represented by the Appellate Public Defender, who submits nearly sixty percent of the cases reviewed by this Court. To hold that appellate counsel should brief every nonfrivolous issue raised in a case would obviously greatly increase the workload of both the Appellate Public Defender, the office of Attorney General, who must answer the issues raised, and this Court, which examines each issue. Furthermore, it would tend to lessen the effectiveness of the briefs. Chief Justice Burger, speaking for the majority in Jones quoted Justice Jackson, who after observing

appellate advocates for many years,
stated:

Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one. Jackson, Advocacy Before the Supreme Court, 25 Temple L.Q. 115, 119 (1951).

Jones, 463 U.S. at _____, 103 S.Ct. at 3313, 77 L.Ed.2d at 994.

The importance of carefully selecting legal issues is further emphasized in a recent Oklahoma Law Review article which specifically addresses the writing of effective briefs submitted to this Court:

The appellate attorney must evaluate the possible legal issues in order to determine which issues are worth pursuing and which issues

should be discarded. If he fails to winnow the strong issues from the weak, the attitude of the appellate court may well be anger because the attorney has failed to do his job and as a consequence is wasting the court's time with meaningless verbiage.

Kershen, The Written Brief For Criminal Cases in Oklahoma, 35 Okl. L. Rev. 499 (1982).

Having carefully reviewed the record, including the transcripts of the trial and the motions hearings, we find the allegation of ineffectiveness of appellate counsel to be without merit.

The two assignments of error mentioned previously are raised through a second method by asserting they are issues of constitutional dimension and thus are not subject to the waiver rule of 22 O.S. 1981, § 1086. Whether a petitioner may assert constitutional issues at any time was addressed in Jones v. State, 704 P.2d

1138 (Okl.Cr. 1985), where we held that we consider a constitutional argument, raised for the first time on application for post-conviction relief where the constitutional remedy was unavailable at trial or on direct appeal. In such a case a "sufficient reason" has been stated for the failure to present the issue on direct appeal. Stewart v. State, 495 P.2d 834 (Okl.Cr. 1972).

Concerning the ineffective assistance of trial counsel argument, the record reveals that the petitioner submitted his brief in 1983. On May 14, 1984, Strickland, supra, was handed down which set the constitutional standards for effective assistance of trial counsel. This Court held in Collis v. State, 685 P.2d 975 (Okl.Cr. 1984) that the standard laid down in Strickland was consistent

with the standard this Court has used when determining whether a defendant was provided effective assistance of counsel. See Johnson v. State, 620 P.2d 1311 (Okl.Cr. 1980). As this remedy was available at the time of direct appeal, petitioner has failed to state a sufficient reason for not raising the issue at that time. Therefore, we will not address it.

Concerning the trial court's refusal to appoint a psychiatrist or psychologist to aid the petitioner in developing the defense of insanity, we note that Ake v. Oklahoma, 470 U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which addresses the issue of court appointed psychological assistance to indigent defendants, was decided subsequent to the submission of the direct appeal for decision. As this

constitutional remedy was unavailable at trial, or during direct appeal, we shall address it. This remedy requires that:

Under certain circumstances, the State may be obligated to provide an indigent defendant with access to competent psychiatric assistance in preparing his or her defense. [Citation omitted]. To trigger this process, the defendant must demonstrate 'to the trial judge that his sanity at the time of the offense is to be a significant factor at trial. . . .' [Ake] at _____, 105 S.Ct. at 1092, 84 L.Ed.2d at 60.

Liles v. State, 702 P.2d 1025, 1033 (Okla.Cr. 1985).

We find that the petitioner failed to make such a demonstration. In Ake, the Supreme Court applied the standards discussed in its decision to the facts, and concluded that Ake's sanity was likely to be a significant factor in his defense:

For one, Ake's sole defense was that of insanity. Second, Ake's

behavior at arraignment just four months after the offense, was so bizarre as to prompt the trial judge, sua sponte, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that his mental illness might have begun many years earlier. Ap. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant.

Ake, at ___, 105 S.Ct. at 1098, 84 L.E.2d at 68.

In contrast, the petitioner did not use the insanity defense, he did not display any bizarre behavior, an examination by the state psychiatrist showed that he was competent to stand

trial and was able to assist in his defense, and finally stated that further observation was unnecessary. Although the petitioner complained of recurring blackouts, a physician who examined him three days after the crimes could not find anything abnormal even though his attention was specifically called to the "soft spot" on the petitioner's head alleged to be the reason the blackouts occurred. In his statement to the police, the petitioner first claimed to have experienced a blackout and was therefore unable to recall his last two days, but after further questioning he gave in detail the events during the crimes. These events were corroborated by the witness, Mrs. Riddle. In his testimony during the trial he first claimed that he had been hit on the head,

and that he had no recollection of what happened for the next two days. On cross-examination he claimed he could not remember the statement which he made to the police which contradicted his testimony. On surrebuttal he changed his story, claimed that he gave the police a statement which he was instructed to give by his unknown assailant about whom he had earlier testified. We find no merit to the petitioner's claims, and no merit to this assignment of error.

Finally, the petitioner alleges that error was committed when the district judge who heard his petition, refused to continue the hearing and refused to disqualify himself from hearing the petition. An examination of the original petition and the hearing transcript reveals that no valid purpose could have

been served by granting a continuance. The only proposition creating an issue of fact was whether Charma Riddle recanted her testimony that the petitioner was the person who had committed the crimes alleged. She was available and testified at the hearing, denying she ever recanted. Summary disposition of all the other issues was appropriate for the reasons we have stated. Furthermore, as the alleged prejudice resulting from the failure to disqualify is that petitioner's counsel was given insufficient time to prepare and present evidence, our finding that refusal to grant a continuance was proper, disposes of this matter as well.

IT IS THEREFORE THE ORDER OF THIS COURT that the district court's denial of post-conviction relief in the District

Court of Muskogee County, Case No. CRF-
82-192, should be, and the same is,
AFFIRMED.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS
COURT this ____ day of _____,
1985.

ED PARKS, PRESIDING JUDGE

TOM BRETT, JUDGE

HEZ J. BUSSEY, JUDGE

ATTEST:

(Clerk)

APPENDIX D

APPENDIX D

IN THE DISTRICT COURT OF MUSKOGEE COUNTY
STATE OF OKLAHOMA

WILLIAM THOMAS)	
CARTWRIGHT,)	
)	
Petitioner,)	
)	
v.	)	No. CRF-82-192
)	
THE STATE OF OKLAHOMA,)	
)	
Defendant.)	

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

On the 22nd day of August, 1985, there comes on for hearing the Defendant's Application for Post-Conviction Relief, the Defendant appearing by his attorney of record, Mandy Welch, and the State appearing by W.A. Edmondson, District Attorney for Muskogee County, and having reviewed the Record in the above styled cause, including all pleadings and affidavits attached thereto, both written and oral,

attached thereto, both written and oral, and the Opinion of the Court of Criminal Appeals in case number F-82-758 (William Thomas Cartwright vs. The State of Oklahoma), having received offers of proof on behalf of the Defendant, and, having heard argument of counsel and citations of law from both the State and the Defendant, this Court makes the following Findings of Fact and Conclusions of Law as to the issues raised in the Application:

Issue 1. That the Defendant was denied effective assistance of counsel due to eight alleged errors or omissions on the part of defense trial counsel. The Court makes the following Findings of Fact:

a. That Defendant's trial counsel has been engaged in the practice of law

for nine years prior to his representation of this Defendant and has appeared before this Court on numerous cases and I have found him to be a conscientious and diligent attorney.

b. That the practice of Defendant's trial counsel was predominately a trial practice, with emphasis on criminal cases.

c. That the Defendant's trial counsel had served with distinction as Muskogee Municipal Court Judge, in addition to his private practice, prior to his representation of Defendant.

d. That the Defendant's trial counsel now serves as an Associate District Judge in another county.

e. That a review of the entirety of the record reveals that trial counsel made extensive use of pre-trial motions,

obtained complete discovery of the State's files in the case, and pursued a vigorous defense at trial in both stages despite the existence of an eye witness to the murder and a taped confession by the Defendant.

The Court therefore makes the following Conclusions of Law:

a. That the Defendant has failed to establish in light of the record that any alleged errors or omissions by trial counsel, viewed in retrospect, constituted ineffective assistance of counsel; and, further,

b. That this issue was, in some respect, and could have been, in all respects, raised on direct appeal and thus is not properly presented in an Application for Post Conviction Relief.

On these Findings and Conclusions, Post-Conviction Relief shall be denied.

Issue 2. That the Defendant was deprived of his rights by the improper excusal of Juror Applegate for cause. the Court makes the following Conclusions of Law:

a. Based upon the statements of the juror, as cited in Defendant's Application, the juror was properly excused.

b. That this issue could have been raised on direct appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these Findings and Conclusions, Post-Conviction Relief shall be denied.

Issue 3. That the Defendant was denied effective assistance of counsel because of the trial court's prohibition

of both State and defense questioning of prospective jurors on their views relating to the death penalty. The Court makes the following Findings of Fact:

a. That the trial court asked each prospective juror "Witherspoon" questions regarding their attitudes toward infliction of the death penalty.

b. That neither the State nor the defense objected to this procedure.

c. That, other than the "Witherspoon" type questions, counsel for each side was given great latitude in voir dire examination.

The Court therefore makes the following Conclusions of Law:

a. That the manner in which voir dire examination is conducted is within the sound discretion of the trial court.

b. That the manner in which voir dire was conducted in the instant case did not deprive petitioner of effective assistance of counsel.

c. That the issue raised herein could have been raised on appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 4. That the Defendant is entitled to post-conviction relief because of newly discovered evidence of a recantation of testimony by the eyewitness of the murder, Mrs. Charma Riddle. The Court makes the following Findings of Fact:

a. That the person to whom Mrs. Riddle allegedly made her recantation was

not named in Defendant's Application, and, although such person was supposedly a relative of the Defendant's his name was presented as a blank space in the Application.

b. No affidavit from any person was attached to the Application alleging to have heard any contradictory statement from, Mrs. Riddle.

c. Mrs. Riddle testified before this Court in the form of an oral affidavit to be considered with the State's Motion for Summary Judgment on the Application and denied any recantation of her sworn testimony at Preliminary Hearing and Trial of the above cause and reaffirmed in open court her identification of the Defendant, a person known to her before the crime, as

the person who murdered her husband and attempted to murder her.

d. The Court found Mrs. Riddle to be a totally competent and credible witness, with vivid and accurate recall of the events which transpired in May of 1982, and further found her testimony before this Court to be believable.

e. That Mrs. Riddle was subjected to cross examination by defense counsel at preliminary hearing, at trial, and again during the Court's consideration of Defendant's Application for Post-Conviction Relief.

f. That the transcripts reveal that the issue of Eulan Pack, Jr.'s involvement in the crime was explored during the trial of the cause with a denial by Mr. Pack of any involvement and a categorical statement by the eyewitness

that the killer was William Thomas Cartwright and not Eulan Pack, Jr., which testimony was reaffirmed by Mrs. Riddle's oral affidavit herein.

The Court therefore makes the following Conclusions of Law:

a. There has been no recantation of testimony by the eyewitness to the crime.

b. That assuming, arguendo, the Defendant could produce a relative or other person to testify that Mrs. Riddle had made contradictory statements post-trial, said testimony would not constitute newly discovered evidence and would not be deemed credible in light of the strong reaffirmation of prior testimony by Mrs. Riddle.

On these Findings of Fact and

Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 5. That the Defendant was denied due process by the denial of a court appointed psychiatrist or psychologist. The Court makes the following findings of fact:

a. While defense counsel did, in fact, request examination "either by a psychoanalyst employed by the State of Oklahoma or in private practice and retained by the State of Oklahoma for this purpose" (defense motion filed July 29, 1982), the file reflects no instance where the sanity of the Defendant was brought in question by any witness or affidavit or plea.

b. That the Defendant was examined at Eastern State Hospital and the Court file reflects its report to the

Court dated May 25, 1982, wherein Dr. Leoncio G. Curva advised the Court that the Defendant was able to advise and assist counsel, was able to fully apprehend the nature of the charges against him, was not in need of psychiatric care or treatment and was not a mentally ill person as defined in Section 3, Title 43A of the Oklahoma Statutes.

c. That the Defendant was further examined by a medical doctor, Richard L. Pentecost, on September 8, 1982, and Dr. Pentecost's letter to the court, filed September 28, 1982, reflects no complaint by Defendant as to blackouts, psychological impairment or mental imbalance and no spontaneous comments by the doctor in those regards.

d. That Dr. Tom Morgan testified at trial that he examined Defendant at Muskogee General Hospital two days following the murder and that Defendant was oriented as to time and place, was able to appropriately answer questions and that an examination of Defendant's head revealed no abnormalities; an emergency room nurse also testified that Defendant was coherent, answered appropriately and was well oriented in May of 1982.

e. That the trial transcript reveals Defendant's claim of blackout was contradicted by Mrs. Riddle's testimony that he engaged in conversation with her during the crime (when asked why he was doing what he did, Defendant's response was "you shouldn't have fired me"), and was further contradicted by Investigator

Gary Sturm's testimony that the Defendant gave a full and complete confession to the crime, relating details of events which transpired during the murder.

f. That there was no credible testimony in the record that the Defendant ever suffered from blackouts, much less was in a state of blackout during the murder.

g. That the Defendant, himself, recanted his testimony of blackout in a handwritten statement dated October 25, 1982, and made a part of the record in the Pre-Sentence Investigation. That statement, written by the Defendant, contained the following pertinent parts:

I told him (Hugh Riddle) I reseaved (sic) a phon (sic) call saying that you wanted to sedle (sic) out of court, he then told me I'd best leave now, or something mite (sic) happon (sic), I said ok, I turned to walk away some one hite (sic) me in the head, as I whent (sic) to

the ground I saw a pare (sic) of work boots & blue jeans, then someone stuck something in my arme (sic), I heard Hugh say no - then I heard a screm (sic) a gun shots (sic) I tryed (sic) to move to run I couldn't move I was nume (sic) all over, they blindfolded me and tied my hands and feet. & put me in a van, I heard one of them talking he said we'll go out thc back way, no one can see use (sic) go out that way, the people on the corner are not at home, they kept going I heard other cars & we kept stoping & starting we were in town I could tell from the other trafic (sic) I heard sireens (sic) police car or something they said we got out of there just in time, one said that she'll say it was him because of what I said to her there's no way she could say it was anyone else, they stoped, opened the doors and took me out of the van, & put me on a plower (sic) and one said go get the paper, he then told me that I'd better leason (sic) to every thing he told me & remember it if I didn't he'd kill my mom & dad & girl friend and if I did beleave (sic) him that for me to look how easy it was for them to get me; then one of them said take his shirt off him and put mine on him that way if they pick him up he'll look like the discription (sic) she gives to the police,

In the aforementioned statement, Defendant states that he did not, in fact, blackout, but was taken captive by the "real killers" and was given instructions of what to confess to in the event he was caught.

h. That, in the first stage of the trial of the above styled cause, Defendant claimed a blackout and denied having given any confession to Investigator Gary Sturm, but that in the second stage, Defendant admitted giving the statement to Sturm but alleged that he had been instructed by an unknown person what to say.

i. Defendant admitted in the trial of the cause that he had never requested or received any medical attention from, doctor or hospital for

what he claimed to have been frequent blackouts.

j. At the trial of the cause the Defendant called no less than seven former co-workers or employers who testified that the Defendant had been a good worker and had never been violent. None testified as to any knowledge of blackouts or loss of memory by the Defendant. The Defendant's mother testified that the Defendant had a severe head injury which caused headaches, but offered no knowledge of blackouts or loss of memory. Only the Defendant's sister, Dovie Fields, testified that the Defendant, as a result of his head injury, would, on occasion "pass out". And only the Defendant testified that the Defendant was capable of blacking out mentally while remaining physically

awake. The Defendant contradicts this allegation by his written statement of October 26, 1982.

The Court therefore makes the following Conclusions of Law:

a. That the Defendant was competent to stand trial, to understand the proceedings against him, and to advise and assist counsel.

b. That the issue of sanity was not raised during the trial of the above styled cause.

c. That the question of a physically induced blackout was fully explored at trial.

d. That the Defendant, while claiming blackout during the trial of the first stage, recanted that claim in the second stage and again prior to sentencing and his resurrection of that

claim in the light of Ake v. Oklahoma, 105 S. Ct. 1087 (1985), is not credible.

e. That the issue raised herein could have been raised on direct appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 6. That the Defendant was deprived of a fair trial due to remarks of the prosecutor.

The Court finds that the Court of Criminal Appeals reviewed the record for fundamental error and, having done so, its findings are res judicata here, and, further, that any such errors could have been raised on direct appeal and are not properly presented in an Application for Post-Conviction Relief.

On these Findings, Post-Conviction Relief shall be denied.

Issue 7. Grounds Seven, Eight, Nine and Ten deal with the jury and trial court's findings that the murder was "heinous, atrocious, or cruel." The Court finds that the issues raised herein were dealt with in part by the Court of Criminal Appeals and the findings of that Court are res judicata here. The Court further finds that any such issues which were not raised on direct appeal could have been so raised and thus are not properly presented in an Application for Post-Conviction Relief.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 8. Grounds Eleven and Twelve deal with the jury and trial court's

findings that the murder created a great risk of death to more than one person. The Court finds that the issues raised herein were dealt with in part by the Court of Criminal Appeals and the findings of that Court are res judicata here. The Court further finds that any such issues which were not raised on direct appeal could have been so raised and thus are not properly presented in an Application for Post-Conviction Relief.

On these Findings, Post-Conviction Relief shall be denied.

Issue 9. That the Defendant was deprived of his rights by the improper excusal of Jurors Applegate and Sweet. The Court makes the following Conclusions of Law:

a. Based upon the statements of the jurors, as cited in Defendant's

Application, each juror was properly excused for cause.

b. That this issue could have been raised on direct appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these findings and conclusions, Post-Conviction Relief shall be denied. Issue 10. That the Defendant was denied a fair trial by the limitation of mitigating testimony in the first stage, later admitted in the second stage. The Court makes the following Findings of Fact:

a. That the trial court in no manner limited the number of witnesses who could be called or testimony which could be presented in the mitigation stage of the proceedings.

b. That this issue was considered on appeal.

The Court therefore makes the following Conclusions of Law:

a. That the issue is without merit.

b. That the findings of the Court of Criminal Appeals in that regard are res judicata here.

On those findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 11. Ground Fifteen in Defendant's Amended Application for Post-Conviction Relief alleges that Defendant was denied effective assistance of appellate counsel for failure to raise issues which could have been raised on direct appeal. The Court makes the following Findings of Fact:

a. Appellate counsel is not obligated to raise issues on appeal which lack merit or foundation in the record.

b. Defendant was represented on appeal by E. Alvin Schay, Appellate Public Defender for the State of Oklahoma, who possesses an extensive background in criminal appeals including death penalty cases.

c. It is the practice of the Oklahoma Court of Criminal Appeals to review every case, and particularly death penalty cases, for fundamental error and none were cited in the Opinion of that Court in this Case.

The Court therefore makes the following Conclusions of Law:

a. That Defendant has failed to establish a denial of effective assistance of appellate counsel.

b. That no fundamental error appears in the transcript of the trial of this cause, that no fundamental errors were found in the Court of Criminal Appeals review of this cause, and that no fundamental error was created in the alleged omissions of counsel in the appeal of this cause.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

THE COURT MAKES THE FOLLOWING ADDITIONAL FINDINGS:

1. While the Defendant made no application for writ of habeas corpus ad testificandum, this Court made inquiry as to whether there was any issue which required his presence in Court or upon which, his testimony would give guidance to the Court in reaching its

determinations. Further, the Court interrupted its proceedings to provide Defendant's counsel an opportunity to consult with her client by phone and accepted a collect call from the Defendant for that purpose. No issue, on its face, required the presence of the Defendant. Further, at no point in the proceedings did the argument of counsel, offers of proof or recitations of fact in the case, give rise to a necessity to suspend the proceedings to obtain the presence of the Defendant. This Court now specifically finds that the Defendant's presence was not necessary nor would it have been of assistance in obtaining a full and complete resolution of the issues raised herein.

2. This Court has further reviewed the entirety of the record for

fundamental error. This review has included the initial determination of the competency of the Defendant, all pre-trial and trial motions and the hearings held thereon, the extent of discovery afforded the Defendant, jury selection and examinations of jurors during that process, argument of counsel, the "blackout" issue and the presentation of both aggravating and mitigating factors in the second stage of the proceedings. While this Court cited a number of issues which were not properly raised in an Application for Post-Conviction Relief, all such issues were reviewed for fundamental error and no such error was found.

BASED UPON THE FINDINGS of the Court relative to each of the issues presented, it is the Order of this Court that the

Application for Post Conviction Relief,
and the Amended Application for Post
Conviction Relief, and each ground
contained therein, be, and are hereby,
DENIED.

JUDGE OF THE DISTRICT COURT

APPENDIX E

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF THE
STATE OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT,)	
)	
Appellant,)	
)	
v.	)	No. F-82-758
)	
THE STATE OF OKLAHOMA,)	
)	
Appellee.)	

William Thomas Cartwright was charged in the District Court of Muskogee County, Oklahoma, for the crimes of Murder in the First Degree, and Shooting with Intent to Kill, Case No. CRF-82-192. He was granted a change of venue to Cherokee County, Oklahoma. The jury before which he was tried returned verdicts of guilt on both counts, sentenced him to death for the murder, and to a term of seventy-five years' imprisonment for the shooting. He was sentenced accordingly.

The appellant began working for the victims in this case, Hugh and Charma Riddle, in their Muskogee remodeling business in July of 1981. His employment was terminated in December of that year. According to the appellant, he was fired because he demanded the Riddles pay for an injury he allegedly received on the job. According to Charma Riddle, he was laid off because of lack of business.

The appellant moved to Las Vegas, Nevada in January of 1982. He returned to Muskogee in late April, supposedly believing his claim against the Riddles for injury would be settled. He told a Muskogee acquaintance that he intended to "get even" with the Riddles.

On May 3, 1982, Hugh and Charma Riddle spent the night with Charma's father in Muskogee. They did not return

to their rural Muskogee home until the early evening hours of May 4. They ate their evening meal and retired to watch television. As Charma made her way to the bathroom from the living room, she was confronted by a man in her hallway with a shotgun. She grabbed the gun, and the man fired it into her leg. After she fell, she saw her assailant and recognized him as the appellant. He shot her again.

Charma then saw the appellant walk into the living room where Hugh was. She saw the appellant fire two blasts from the shotgun, and heard her husband scream.

The appellant disappeared into the living room, and Charma dragged herself down the hall into a bedroom. She tried to use the telephone, but it was dead.

She then began to write her assailant's name on the bedsheet in her blood. She managed to spell the letters TOM CAR.

The appellant entered the bedroom. Charma asked him why he had shot them, and he replied that they should not have fired him. Charma then asked the appellant to help her. The appellant slit her throat and stabbed her with the hunting knife the Riddles had given him for Christmas.

Miraculously still alive, Charma heard the telephone ring in another room. She deduced that the telephone she had tried to use earlier was only unplugged. She plugged it in and called an operator, who contacted the Muskogee police department. She told the police dispatcher that Tom Cartwright had shot her, and that he was still in the house.

Pursuant to the directions Charma gave, Muskogee County Sheriff's officers and Muskogee police officers arrived at the house. The first officer who arrived observed a man standing outside the Riddle home. The man dodged between trees before disappearing into the darkness. A subsequent search for him was fruitless.

Clothing, weapons and other possessions belonging to the Riddles were found inside their vehicle. Found along with those articles was a silver jacket which was identified as being similar or identical to one the appellant owned.

The officers found the body of Hugh Riddle lying face down in the living room inside the Riddle home. Charma was still in the bedroom. She was taken by ambulance to the Muskogee Hospital. She

lived to testify against the appellant at trial.

Two days after the murder/shooting (May 6, 1982), the appellant called his sister from a pay telephone in Muskogee. The sister picked him up, fed him, gave him a change of clothes and called the Muskogee County District Attorney. The District Attorney came to the sister's house, and got the appellant. The appellant was taken to jail, but then was taken to the hospital, because he complained of a headache and a leg injury. After a doctor had seen him and prescribed aspirin, the appellant was taken to the courthouse for interrogation. He confessed to the crimes during the interrogation.

The Riddles' telephone bill for the month of May, 1982 was introduced into

evidence to demonstrate that at 11:13 a.m. on May 4, a telephone call was placed to a Las Vegas, Nevada telephone number. It was established that the number belonged to the appellant's fiancée.

A note which was found tacked to the door of the Riddle residence by Charma's father on May 6 was introduced into evidence. The note contained several misspellings, and stated that the Riddles had made an emergency trip to Tennessee. Charma testified that although she and Hugh had planned a trip to Tennessee at some point in the coming year, they were not about to make such a trip, and neither of them had written the note. The appellant was requested to write the same words that the note contained at trial. He misspelled several words,

including the identical misspelling of the word "such," which was spelled "sutch" in both notes.

The appellant testified that he spoke with Hugh Riddle in the late afternoon of May 4, concerning his alleged injury. Hugh ordered him off his property, and as he turned to leave, he was struck on the head. He stated that he remembered nothing until May 6, when he called his sister.

Upon cross examination, the prosecutor read several excerpts of the appellant's confession for the purpose of impeaching his testimony concerning the two day "blackout." The appellant stated he did not remember making any of the statements.

The appellant presented lay testimony that, due to a childhood injury, he had a

"soft spot" on his head, which, when touched, caused him to "black out." Also, several relatives, employees, supervisors and co-workers testified that he was a good worker, and that he was not a violent person.

The appellant first complains that the confession he made on May 7 was involuntary, and therefore inadmissible for any purpose, because he was not aware he was talking to law enforcement authorities. He contends that he consented to interrogation by the District Attorney because he was convinced by his sister that the District Attorney was an attorney who wanted to help him.¹

¹ The appellant's contact with the Muskogee County District Attorney (hereinafter called the D.A.) was engineered by his sister, Dovie Field. Shortly after the murder/shootings, a

From a review of the testimony had at trial and on the motion to suppress the confession, we are convinced that the circumstances surrounding the appellant's interrogation indicate that he was coherent, and doubtless knew that he was dealing with law enforcement officials.²

close friend of the Riddles contacted Dovie and threatened to kill her and her brother. She contacted the police who, after some investigation, told her to file a complaint at the courthouse. At the courthouse, the D.A.'s secretary learned who Dovie was, and directed her to the D.A.'s office. Dovie and the D.A. discussed the appellant, and she agreed to contact the D.A. when she saw him. According to Dovie, at that time she knew the D.A. was a District Attorney, but thought that meant he was a "higher up

The portions of the confession were therefore properly utilized for purposes of impeachment. No objection was made to the trial court's instructions concerning the substantive use of the confession, or to the prosecutor's remarks concerning such use. Thus, any error was waived. Jetton v. State, 632 P.2d 432 (Okla. Cr. 1981). Moreover, in view of both the direct and circumstantial evidence of the appellant's guilt independent of the portions of the confession used at trial, we are convinced that any possible error which may have occurred was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17

See footnote 1, *infra*.

It is also interesting to note that the appellant testified that he was abused as he climbed the stairs to the courthouse, that he was shouted at prior to the tape recorded interrogation and that he was told the uniformed police officer saw only what he was told to see. Without deciding whether the allegations are true, we would only comment that these circumstances support the conclusion that the appellant knew he was not in the hands of a defense attorney.

³ Title 21 O.S. 1981, § 701.10 states, in pertinent part that, "Only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

L.Ed.2d 705 (1967); Coleman v. State, 668 P.2d 1126 (Okla.Cr. 1983).

The appellant's third assignment of error is that the failure to file a bill of particulars by the time of the preliminary hearing, or to present evidence in support thereof at the preliminary hearing, deprived the trial court of jurisdiction to sentence him to death. We have previously held that defendants in capital cases are not entitled to preliminary hearings on bills of particular. Stafford v. State, 669 P.2d 285 (Okla.Cr. 1983), vacated and remanded on other grounds, _____ U.S. _____, _____ S.Ct. _____ (1984); Coleman, supra; Johnson v. State, 665 P.2d 815 (Okla.Cr. 1983); Brewer v. State, 650 P.2d 54 (Okla.Cr. 1982). The bill of particulars, filed on October 4,

1982, complied with the requirements of 21 O.S. 1981, § 701.10.³ The allegations contained therein consisted of the facts of the case, and inferences permissibly drawn therefrom. Further, we do not believe there was any surprise or prejudice to the appellant, since trial counsel neither raised an objection concerning the matter prior to trial or in the motion for new trial. The allegation is without merit.

The appellant's second assignment of error is that the trial court erroneously failed to instruct the jury that the trial court would impose a life sentence

³ Title 21 O.S. 1981, § 701.10 states, in pertinent part that, "Only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

if a unanimous verdict were not reached on the issue of punishment.

The instructions given by the trial court accurately and adequately addressed the matter. The instructions stated, in pertinent part:

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life. (Instr. No. 15, Tr. 620).

* * *

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the d e a t h

penalty shall not be imposed.
(Instr. No. 17(a), Tr. 621).

This assignment of error has no merit.

The appellant's ninth allegation of error proceeds upon the following two premises: first, in the guilt stage, the trial court ruled certain testimony by the appellant's mother and sister inadmissible;⁴ and second, all the testimony presented by the appellant in the guilt stage was incorporated by stipulation as mitigating evidence in the

⁴ The trial court refused to allow the appellant's mother to testify to the appellant's character and disposition as compared to his siblings'. The mother was allowed to testify, as were several other witnesses, that the appellant had a nonviolent disposition.

The trial court also refused to allow the appellant's sister to give testimony in rebuttal, which defense counsel admitted would be nothing different or new from her testimony given during the case in chief.

punishment stage. Citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), appellate counsel therefore concludes that, by virtue of the trial court's rulings in the guilt stage, the appellant's right to present evidence in mitigation of the death penalty was unconstitutionally curtailed.

The trial court's rulings in the guilt stage were correct. See, 12 O.S. 1981, 2403, footnote 4 supra. Additionally, there is no argument in either the record or upon this appeal to indicate that counsel was, or even considered himself to be, prohibited from presenting that evidence in the second stage, had he thought it necessary or useful. The argument that alleged error was "bootstrapped" into the punishment

stage by a voluntary stipulation is utterly devoid of merit.

We now turn to our statutorily mandated review of whether the sentence of death was appropriate in this case. See, 21 O.S. 1981, § 701.13(C)(1-3).

We first find from a review of the transcript that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The appellant was granted a change of venue to ensure his trial was removed from the arena of public prejudice in Muskogee County. The trial court, prosecutor and defense counsel all performed their duties admirably, and the appellant received a fair trial.

Secondly, we must determine whether the evidence supported the jury's determination that the murder of Hugh

Riddle was especially heinous, atrocious or cruel, and that the appellant knowingly created a risk of death to more than one person. The appellant has also raised these considerations in his fourth and sixth allegations of error, respectively.

In assessing whether the murder was especially heinous, atrocious or cruel, the appellant would have us consider the shooting as an isolated event, to-wit: that the appellant walked into a room and shot Hugh Riddle at close range with a shotgun, killing him almost immediately. He would therefore have us conclude under Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) and Odum v. State, 651 P.2d 703 (Okla. Cr. 1982) that the murder was not torturous,

and therefore was not especially heinous, atrocious or cruel.

According to the plurality in Godfrey v. Georgia, the Georgia Supreme Court had defined the aggravating circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" essentially to mean that torture must have been involved in the murder. Godfrey, 446 U.S. at 431. This Court has not defined the "especially heinous atrocious or cruel" aggravating circumstance in such a manner. The statute is written in disjunctive language, and we have defined "heinous" as "extremely wicked or shockingly evil"; "pitiless or designed to inflict a high degree of pain, utter indifference to, or

enjoyment of the sufferings of others." Eddings v. State, 616 P.2d 1159 (Okla. Cr. 1980), remanded for resentencing 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

While it is true that torture may be a sufficient factor to justify a finding that the murder was especially heinous, atrocious or cruel, (see, Stafford v. State, 665 P.d 1205 (Okla. Cr. 1983), wherein the defendant marched six persons into a meat locker and opened fire, amidst the screams for help; and Jones v. State, 648 P.d 1251 (Okla. Cr. 1982), wherein the defendant shot his victim at point blank range, and mocked him as he bled to death), it is not a necessary one. In Eddings v. State, 616 P.d 1159 (Okla. Cr. 1980), this Court held that the fact that the victim was a police officer rendered the crime especially heinous,

atrocious or cruel under the above definitions.

This Court held in Boutwell v. State, 659 P.2d 322 (Okl.Cr. 1983), that the murder of a convenience store clerk was "especially heinous, atrocious or cruel," because the defendant, who knew the victim, planned the murder well in advance. In Davis v. State, 665 P.2d 1186 (Okl.Cr. 1983), this Court held that the defendant's act of shooting his victims several times was "atrocious." In Jones, supra, we held that the defendant's acts of shooting three persons in a barroom for no apparent reason was "extremely wicked" and "shockingly evil." In Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980), we held that the manner in which the victims were killed, coupled with the demands for

ransom and the manner in which the bodies were disposed of justified the imposition of the death sentence, when one of the aggravating circumstances found was that the murder was especially heinous, atrocious or cruel.

Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to

stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. - See as well our

discussion in Nuckols v. State, _____
P.2d _____, 55 O.B.A.J. 2259 (Okl.Cr.
Oct. 19, 1984), of the consideration to
be given to the manner of a killing in
determining whether a murder is heinous,
atrocious or cruel.

Likewise, it is apparent from these
facts that the appellant's murderous
escapade created a great risk of death to
more than one person. Evidence at trial,
which was subsequently incorporated by
reference into the punishment stage,
established that when Charma arrived at
the hospital, her blood pressure was
almost nonexistent, and that she would
have died had she arrived any later. The
fact that the two victims were not
together in the same room when the
appellant shot them is immaterial, in
light of the close proximity of the

victims, and rapid and fluid nature of the appellant's attack.⁵

Thirdly, we hold the sentence of death in this case not to be excessive or disproportionate to the penalty imposed in similar cases, considering both the

⁵ The appellant argues in his seventh assignment of error that the trial court's failure to provide any definition for the "knowingly created a great risk of death to more than one person" aggravating circumstance unconstitutionally afforded the jury uncontrolled discretion, within the meaning of Godfrey v. Georgia, 446 U.S.420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

This argument has been raised for the first time on appeal. It is therefore not properly before us. McDuffie v. State, 651 P.2d 1055 (Okl.Cr. 1982). Moreover, as the State asserts, there was no reason to request such an instruction. The constitutionality of the statute has been upheld against arguments that it is overly broad. See, Burrows v. State, 640 P.2d 533 (Okl.Cr. 1982); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

crime and the defendant.⁶ See Stout v. State, _____ P.2d _____, 55 O.B.A.J. 2269 (Okl.Cr. Oct. 24, 1984), wherein defendant broke into his sister's and brother-in-law's home and beat their brains out; Nuckols v. State, supra, wherein defendant stopped to help a motorist, drank a beer with him, visited with him, and then with codefendant attacked victim with a ball peen hammer, hitting and kicking victim to death;

⁶ The appellant's fifth assignment of error is that this Court has been evaluating the heinous, atrocious or cruel aggravating circumstances (21 O.S. 1981, § 701.12(4) in an arbitrary manner. We have considered the argument to the extent that it applies to our consideration of whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S. 1981, § 701.10(c)(3). Beyond this, the appellant has no standing to complain of decisions reached in other cases.

Stafford v. State, 669 P.2d 285 (Okla. Cr. 1983) vacated and remanded on other grounds, _____ U.S. _____, _____ S.Ct. _____, (1984), wherein the defendant emerged from hiding and shot a family when they stopped along the roadside to help a person they believed to be in distress; Coleman v. State, supra, wherein the defendant murdered a man and woman who walked in on him as he was burglarizing their residence; Davis v. State, 665 P.2d 1126 (Okla. Cr. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 203, wherein, after a prior altercation, the defendant shot and killed two persons as they were moving his estranged wife's property from his apartment; Ake v. State, 663 P.2d 1 (Okla. Cr. 1983), wherein the defendant and his accomplice gained entry into their

victims' home, tied them up, and shot the four of them, killing two; and Hays v. State, 648 P.2d 1251 (Okl.Cr. 1982), wherein the defendant assaulted some motorists with a pistol after having robbed and killed a store owner. We also find that the appellant's conduct was much more egregious than that of the defendant in Odum v. State, 651 P.2d 703 (Okl.Cr. 1982), wherein the defendant approached the pickup in which the victim was riding and, from the outside, fired one shot through his neck, and left the scene.⁷

⁷ We have also compared this case with the following cases and found the sentence of death herein is not excessive or disproportionate: Robison v. State, 674 P.2d 1134 (Okl.Cr. 1984), cert. denied, _____ U.S. _____, 104 S.Ct. 3548; Stafford v. State, 665 P.2d 1205 (Okl.Cr. 1983), vacated and remanded on other grounds, _____ U.S. _____, 104 S.Ct. 2652 (1984); Parks v. State, 651 P.2d 686 (Okl.Cr. 1982), cert. denied, _____ U.S. _____.

In view of the above, we hold that the appellant's eighth assignment of error, that modification is mandated if one of the two aggravating circumstances falls, must be dismissed.

The judgments and sentences are
AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF
CHEROKEE COUNTY, OKLAHOMA
THE HONORABLE HARDY SUMMERS, JUDGE

WILLIAM THOMAS CARTWRIGHT, appellant, was charged, tried and convicted in the District Court of Cherokee County, Oklahoma, Case No. CRF-82-192, for the crimes of Murder in the First Degree and Shooting with Intent to Kill. He was sentenced to death for the murder, and seventy-five years' imprisonment for the shooting. **AFFIRMED.**

E. ALVIN SCHAY
APPELLATE PUBLIC DEFENDER

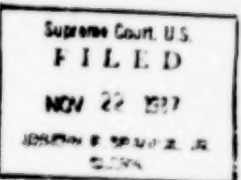
_____, 103 S.Ct. 800 (1983); Jones v. State, 648 P.2d 1251 (Okla. Cr. 1983) cert. denied, _____ U.S. _____, 103 S.Ct. 799; and, Chaney v. State, 612 P.2d 269 (Okla. Cr. 1980), cert. denied, 450 U.S. 1025, 101 S.Ct. 1731 (1981).

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OPINION BY BUSSEY, P.J.
PARKS, J., CONCURS IN RESULTS
BRETT, J., CONCURS

ORIGINAL



NO. 87-519

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GARY MAYNARD, et al.,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, William Thomas Cartwright, moves for leave to proceed in this Court in forma pauperis pursuant to Rule 46 of the Rules of this Court.

Respondent is incarcerated in the Oklahoma State Penitentiary and is without funds with which to pay the costs of this proceeding. He sought and was granted leave to proceed in forma pauperis in the United States District Court for the Eastern District of Oklahoma and in the United States Court of Appeals for the Tenth Circuit.

The undersigned attorney was appointed as counsel for respondent by the Court of Appeals under the Criminal Justice Act of 1964, as amended, and, pursuant to Rule 46 of the Rules of this Court, an affidavit in support of this motion is not required.

WILLIAM THOMAS CARTWRIGHT

BY Mandy Welch
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CERTIFICATE OF SERVICE

I, Mandy Welch, a member of the Bar of this Court, hereby certify that on November 22, 1987, a copy of the foregoing was mailed by first-class, postage prepaid mail, to:

David Lee
Assistant Attorney General
112 Capitol Building
Oklahoma City, Oklahoma 73105

Mandy Welch
MANDY WELCH

No. 87-519

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GARY D. MAYNARD AND THE
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 87-519

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

GARY D. MAYNARD AND THE
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

This brief is submitted by respondent Cartwright in opposition to the petition for a writ of certiorari filed by petitioner State of Oklahoma.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Did the Oklahoma Court of Criminal Appeals violate the Eighth and Fourteenth Amendments by upholding a death sentence based upon the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," where neither the jury instructions nor the Court of Criminal Appeals defined or applied that aggravating circumstance in such a manner as to avoid the arbitrariness condemned in Godfrey v. Georgia, 446 U.S. 420 (1980)?

(2) Can respondent's death sentence stand under the Eighth and Fourteenth Amendments where one of the two statutory

aggravating circumstances found by the jury is constitutionally invalid and the sentence was imposed pursuant to a statute that required the jurors to balance the aggravating and mitigating circumstances?

COUNTER-STATEMENT OF THE CASE

Respondent Cartwright was employed by Hugh and Charma Riddle in their construction business in 1981 and 1982. T 381-82. Mr. Cartwright injured his leg on the job. T 409. He was fired after he and Mr. Riddle had a disagreement over the payment of medical bills for treatment of his work-related injury. T 477-78.

Several months after being fired, Mr. Cartwright went to the Riddles' home to discuss a settlement of his claim for medical benefits. T 482. Ms. Riddle unexpectedly discovered Mr. Cartwright in the hall with a shotgun belonging to her husband. According to her testimony, she grabbed the gun, "pushed it aside and it went off." T 391, 411. She fell and Mr. Cartwright shot her again. T 412. Mr. Cartwright then went into the living room and shot Mr. Riddle. T 392. He died instantly. Thereafter, Mr. Cartwright and Ms. Riddle struggled and he stabbed her with a knife.¹ T 394.

Mr. Cartwright voluntarily turned himself in to the authorities two days after the crime. T 220. At that time, he was emotionally distraught, shaking, and had difficulty talking. T 223, 224, 440. The evidence at trial indicated that he suffered a loss of memory regarding many of the events preceding and following the offense. T 487-90.

The shooting of Mr. and Ms. Riddle was strikingly inconsistent with Mr. Cartwright's previous history. He had no prior criminal record of any sort. T 468-71. Further, he had no history of violent or assaultive behavior. According to the testimony of relatives and previous employers, Mr. Cartwright had always been a good and dependable employee, had not shown any

¹ Mr. Cartwright received a 75-year sentence for the attack on Ms. Riddle.

tendency toward violence, and had usually avoided disputes. T 430-67. He had been a good friend and valued employee of the Riddles. T 405, 475, 478. However, when Mr. Riddle fired him over a disputed medical bill, he felt betrayed and apparently suffered considerable emotional distress.

Prior to trial, the prosecutor filed a Bill of Particulars alleging three aggravating circumstances under the Oklahoma capital sentencing statute. Okla. Stat. Ann. tit. 21 §§ 701.12 (2), (4), (7) (West 1983): (1) Mr. Cartwright created a great risk of danger to more than one person; (2) the murder was "especially heinous, atrocious, or cruel"; and (3) there was a probability that Cartwright would commit future crimes of violence that would constitute a threat to society. The jury, finding the first and second aggravating circumstances but not the third, returned a death sentence.²

The Oklahoma Court of Criminal Appeals -- which once ruled in another case that the "especially heinous" circumstance must be applied according to the narrowing instruction approved in Proffitt v. Florida, 428 U.S. 242, 255-56 (1976)³ but which thereafter abandoned such a requirement⁴ -- applied no narrowing

² The instructions which directed the jury's consideration of the "especially heinous" circumstance were the following:

As used in these Instructions, the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

T 620.

³ In Proffitt, the Court held that by limiting the application of the heinous, atrocious, or cruel circumstance to "the conscienceless of pitiless crime which is unnecessarily torturous to the victim," the state provided adequate guidance to the sentencer. 428 U.S. at 255-56 (quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)). The Oklahoma court appeared to adopt this limitation in Eddings v. State, 616 P.2d 1159, 1167-68 (Okla. Crim. App. 1980), rev'd on other grounds sub nom., Eddings v. Oklahoma 455 U.S. 104 (1982).

⁴ See, e.g., Irvin v. State, 617 P.2d 588, 598-99 (Okla. Crim. App. 1980) (not mandatory to include the "unnecessarily torturous to the victim" language in instructions to jury); Nuckols v. State, 690 P.2d 463, 471-73 (Okla. Crim. App. 1984) ("suffering of the victim is not the major factor we consider regarding this aggravating circumstance").

definition in Mr. Cartwright's case. Rather, it found the "especially heinous" circumstance had been established "in light of the circumstances attendant to the murder," without specifying any criterion, factor, or aspect of the "circumstances" that explained or limited the application of this aggravating circumstance. Cartwright v. State, 695 P.2d 548, 554-55 (Okla. Crim. App.), cert. denied, 473 U.S. 911 (1985) (App. E. at 23-25). The Tenth Circuit, in a unanimous en banc opinion, granted the writ as to Mr. Cartwright's sentence of death. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (App. A). It held that the "especially heinous" standard had been applied in a vague and overbroad manner in violation of Godfrey v. Georgia, 446 U.S. 420 (1980), and that Mr. Cartwright's death sentence could not stand where one of two aggravating circumstances found by his sentencing jury was constitutionally invalid, since "[a]n aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer...." 822 F.2d at 1482.

REASONS FOR DENYING THE STATE'S PETITION FOR WRIT OF CERTIORARI

There is no issue worthy of certiorari presented by this case. The Tenth Circuit's unanimous en banc opinion is clearly correct. It faithfully follows the fundamental constitutional principles established by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980), Zant v. Stephens, 462 U.S. 862 (1983), and Barclay v. Florida, 463 U.S. 939 (1983). Contrary to petitioner's main argument, there is no conflict among the circuits.

I

THE GODFREY ISSUE

In Furman v. Georgia, 408 U.S. 238 (1972), this Court required "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S.

153, 189 (1976). Following Furman, Oklahoma and other states adopted death penalty statutes setting forth various aggravating circumstances to be considered by the sentencer. In Gregg v. Georgia, supra, the Court held that a facially vague aggravating circumstance was not necessarily unconstitutional because the state courts could adopt narrowing constructions sufficient to focus the jury's attention on objective criteria that would avoid arbitrary and capricious results. See also Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

In Godfrey v. Georgia, supra, the Court considered whether Georgia had adopted a constitutionally narrowing construction of its statutory "vileness" aggravating circumstance (*i.e.*, whether a murder is "outrageously or wantonly vile, horrible or inhuman in that it involves torture, depravity of mind, or an aggravated battery to the victim"). Godfrey, following a prolonged and heated marital dispute, shot his wife and mother-in-law and assaulted his young daughter. The wife and mother-in-law each died instantly. In reversing Godfrey's death sentence, the Court pointed out that the Georgia Supreme Court had upheld it under the vague and subjective "vileness" standard without requiring, as previous cases had done, evidence of objective facts of "torture, depravity of mind, or an aggravated battery to the victim." 446 U.S. at 430-31. Thus, Georgia had failed to provide a "principled way to distinguish [a] case, in which the death penalty [is] imposed, from the many in which it is not." 446 U.S. at 433.

The Tenth Circuit correctly recognized that Godfrey controls this case. The two cases are factually indistinguishable in all material respects. Here, as in Godfrey, the victim died instantly from a gunshot wound.⁵ Here, as in Godfrey, Oklahoma

⁵ Indeed the sequence of events was not materially different in either case, except that Godfrey killed two persons and Mr. Cartwright killed one. Godfrey shot and killed one victim with a shotgun, by shooting her through the window of her trailer. He then entered the trailer and struck and injured his daughter with the barrel of the shotgun. Thereafter, he pointed the gun at the second homicide victim and shot her in the forehead, killing her instantly.

had once interpreted its "especially heinous" factor as requiring evidence of physical abuse or torture -- an objective standard approved by this Court in Proffitt v. Florida, supra. But here, as in Godfrey, the Oklahoma court abandoned any narrowing construction of the vague statutory phrase and sanctioned the death sentence based on a subjective and open-ended consideration that gave the sentencer unbridled discretion to find the "especially heinous" circumstance on the basis of all the facts in the case. As the Tenth Circuit explained in Mr. Cartwright's case,

The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standards limit that discretion.

822 F.2d at 1491.⁶

As the Tenth Circuit's opinion makes manifest, Cartwright is thus a straightforward application of Godfrey to a case arising under Oklahoma's capital sentencing statute. The Tenth Circuit's statement of the Godfrey requirements neither extends nor reframes nor even significantly elucidates the holding or the plain implications of Godfrey. There simply is no constitutional point or principle for which Cartwright could be cited that is not already fully controlled by Godfrey.

Cartwright does, of course, add an analysis of Oklahoma law. But Oklahoma law is a matter of no national consequence. Neither Oklahoma law nor the application of an unembroidered federal constitutional principle to a peculiar body of Oklahoma caselaw is an appropriate subject for this Court's certiorari jurisdiction. Indeed, the Court has long made it a practice to defer to the judges of the federal circuit courts in their reading of state law, since they are closer to it and more

⁶ As a leading commentator has noted, "The Oklahoma Court of Criminal Appeals' view of its state's 'especially heinous, atrocious, or cruel' aggravating circumstance has proven to be remarkably inclusive.... [I]t has used whatever it finds distasteful about a murder to affirm an especially heinous finding." Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L. Rev. 941, 986 (1986).

familiar with the landscape of state court decisions than this Court can possibly be.

Even as to state law, however, the Tenth Circuit has not purported to write the last word. Rather, it has carefully adhered to the limits of constitutional intrusion permitted-- indeed required -- by Godfrey. To dress the case up as worthy of this Court's plenary review, the State is forced to distort the Tenth Circuit's holdings in this respect. For example, the State says that "[t]he opinion of the Tenth Circuit in Cartwright can be read to imply that the aggravating circumstance 'especially heinous, atrocious, or cruel' must be limited to those cases where the victim suffered from physical abuse, and factors such as the attitude of the killer cannot be considered...." Petition, at 24. The Tenth Circuit does not say, and its opinion cannot "be read to imply" anything of the sort. What it says-- as it must under Godfrey, Gregg, and Proffitt -- is that the Oklahoma Court of Criminal Appeals is obliged to give some sort of limiting construction to the "especially heinous" aggravating circumstance, and that the limiting construction adopted by the court must be adhered to in its review of sentencers' findings of the "especially heinous" circumstance. Further, the Tenth Circuit says -- as Godfrey squarely holds -- that if a state court decides to confine the "especially heinous" circumstance to cases involving torture or physical abuse, as it could properly do under Proffitt, it cannot turn this limiting principle on and off at random and approve a finding of the especially heinous circumstance where physical abuse is lacking.

Compounding this distortion, the State says that the Tenth Circuit held that "because the Oklahoma Court of Criminal Appeals, in reviewing cases in which [the especially heinous circumstance] ... ha[s] been found, has held that either the attitude of the killer, the manner of the killing, or the suffering of the victim can be used to uphold a jury finding..., the Oklahoma court ha[s] not interpreted the aggravating circumstance in a way that genuinely narrow[s] the class of

persons subject to the death penalty." Petition, at 22-23. Again, the Tenth Circuit held nothing of this sort. To the contrary, what the Tenth Circuit did was to explore each of these dimensions -- the killer's attitude, the manner of the killing, and the victim's suffering -- as the Court of Criminal Appeals has developed each, to see if any of the dimensions imposed any genuine restriction upon the classification of murders as heinous, atrocious or cruel. Only after finding that none of these dimensions imposed any such restriction did the Tenth Circuit hold that the Oklahoma court had failed to adhere to Godfrey, according to Godfrey's plain terms. 822 F.2d at 1489-91.⁷

Thus, contrary to the State's depiction of the Tenth Circuit's opinion, the Tenth Circuit in no respect mandated that Oklahoma adopt any particular limiting principle in applying the "especially heinous" aggravating circumstance. It determined only that Oklahoma had neither adopted nor adhered to such a principle. And in making this determination, the Tenth Circuit left open to the Oklahoma Court of Criminal Appeals the option of avoiding any future Godfrey problems by reinstating the "unnecessarily torturous" limiting principle which it originally adopted but then abandoned, or by adopting any other clarifying interpretation of the "especially heinous, atrocious, or cruel" language that the Court of Criminal Appeal might choose, within

⁷ The court did note that Oklahoma's definition of "cruel" (see n. 2, supra), in focusing on the suffering of the victim and the defendant's attitude toward it, "is somewhat more precise...." 822 F.2d at 1489. There were, however, two reasons that this definition failed to cure the Godfrey problem:

First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance.... Second, because the Oklahoma court has emphasized that a murder need only be heinous, atrocious, or cruel,.... even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance.

Id. at 1489-90 (citations omitted) (emphasis in original).

the wide latitude left by Godfrey and undiminished by the Cartwright opinion itself.

The State's final attempt to make its petition seem worthy of plenary review is its manufacture of conflicts between the Tenth Circuit in Cartwright and other circuits. The State asserts that other federal circuits have upheld the application of other states' "especially heinous" provisions to cases factually similar to Mr. Cartwright's, see, e.g., Petition, at 23-24, 25-26, and that the Fourth Circuit's decision in Turner v. Murray⁸ is inconsistent with Cartwright because Turner distinguished Godfrey on grounds that imply that the Fourth Circuit "reviewed the attitude of the killer in determining whether the evidence supported the aggravating circumstance, which was identical to the review conducted by the Oklahoma Court of Criminal Appeals in this case," Petition, at 26-27. All of this is vastly wide of the mark, inasmuch as the Tenth Circuit never purported to decide whether Mr. Cartwright's particular offense could or could not have been characterized as especially heinous, atrocious, or cruel on the facts, had the Oklahoma Court of Criminal Appeals chosen to adopt a limiting principle against which to measure those facts.⁹ Nor did the Tenth Circuit hold

⁸ Turner v. Bass, 753 F.2d 342, 351-53 (4th Cir. 1985), rev'd on other grounds sub nom., Turner v. Murray, 90 L.Ed.2d 27 (1986).

⁹ Indeed in all the cases cited by the State as factually similar cases, the states involved had adopted and adhered to a variant of the "unnecessarily torturous" limiting principle. See Turner v. Bass, 753 F.2d at 351-53 (applicable where aggravated battery of the victim preceded the killing); Evans v. Thigpen, 631 F.Supp. 274, 284 (S.D. Miss. 1986), aff'd, 809 F.2d 239, 241 (5th Cir. 1987) (applicable only to "'conscienceless or pitiless crime which is unnecessarily torturous to the victim'"); Francois v. Wainwright, 741 F.2d 1275, 1286 (11th Cir. 1984) (applicable only to cases involving physical or psychological torture); Booker v. Wainwright, 764 F.2d 1371, 1380 (11th Cir. 1985) (same); White v. Wainwright, 809 F.2d 1478, 1485 (11th Cir. 1987) (same). Whether the finding of heinous, atrocious, or cruel in Mr. Cartwright's case would have been sustained in these states is irrelevant, for Godfrey's rule cannot be satisfied simply because there is some other state in which the finding would have been sustained under a properly limited application of the circumstance. Instead, Godfrey entitles the condemned person to have the finding of his aggravating circumstances measured against limiting principles that have been adopted and applied with reasonable consistency by the courts in which he has been sentenced and in which his sentence is reviewed.

that there would be anything wrong with the Oklahoma Court of Criminal Appeals' considering a killer's attitude as relevant to the "especially heinous" circumstance, so long as the consideration of this factor complied with Godfrey in defining a particular attitude that would establish the "especially heinous" circumstance and adhering to that definition. What the Tenth Circuit did hold was the following:

We make no judgment as to whether the attack in this case was 'especially heinous, atrocious, or cruel.' We hold only that the Oklahoma courts failed to guide the sentencer's discretion with constitutionally adequate standards.

822 F.2d at 1492.

II

THE STEPHENS ISSUE

In determining the effect of the sentencer's reliance in Mr. Cartwright's case on a constitutionally invalid aggravating circumstance, the Tenth Circuit again conducted a straightforward analysis, on the basis of the principles articulated by this Court in Zant v. Stephens, 462 U.S. 862 (1983), and Barclay v. Florida, 463 U.S. 939 (1983). Even the State does not fault this analysis.¹⁰ Instead, the State directs its entire effort toward manufacturing a non-existent conflict between the Tenth Circuit and the Fifth Circuit on this question. The State's fabrication is based upon a misunderstanding of Stephens and Barclay and their differing analyses with respect to "non-balancing," Georgia-type death penalty statutes and "balancing," Florida-type death penalty statutes. The Tenth Circuit, however, plainly understood these differing analyses.

Whether a death sentence must be vacated if one of two or more statutory aggravating circumstances found by the jury is subsequently held to be unconstitutional "depends on the function of the jury's finding of an aggravating circumstance under [the state's] capital sentencing statute...." Stephens, 462 U.S. at

¹⁰ Indeed the State did not argue before the Tenth Circuit, nor has it argued here, that the sentencer's improper consideration of the "especially heinous" circumstance had no effect on Mr. Cartwright's sentence.

864. In examining the Georgia statute in Stephens and the Florida statute in Barclay, this Court identified significant differences between "the function of the jury's finding of an aggravating circumstance" under the Georgia and Florida statutes.

In Stephens, the Court found that the sole function of the jury's finding of an aggravating circumstance in Georgia is to narrow the class of persons eligible for the death penalty. 462 U.S. at 875. Upon the jury's finding of one statutory aggravating circumstance, the defendant becomes death-eligible. Once the defendant is death-eligible, the jury may in its discretion impose the death penalty after considering all the facts and circumstances of the case.

[T]he jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.

Id. at 873-74. For these reasons, so long as one valid statutory aggravating circumstance is found, as in Stephens, the function of finding an aggravating circumstance in Georgia -- narrowing the class of death-eligible defendants -- has been fulfilled. Id. at 879. If one or more of the other aggravating circumstances is improperly found, that error is harmless. Id. at 886-89.

In contrast to Georgia's statutory scheme, the function of the finding of an aggravating circumstance in Florida is not simply to narrow the death-eligible class, but, rather, to guide the discretion of the sentencer. When an aggravating circumstance is found in Florida, it must be weighed against the mitigating circumstances. If it outweighs the mitigating circumstances, death can be imposed. Although "the sentencing authority is not required to impose the death penalty" at this point, Barclay 463 U.S. at 963 (Stevens, J., joined by Powell, J., concurring), the sentencer's discretion "is more

circumscribed" at this point than at the corresponding point in Georgia's capital sentencing process. *Id.*

When aggravating circumstances are found in Florida, they play a crucial role in guiding the sentencer's ultimate exercise of sentencing discretion. Unlike Georgia, where "the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard," *Stephens*, 462 U.S. at 873-74, Florida does instruct the jury in this fashion. In the Florida scheme, therefore, the erroneous weighing of an aggravating circumstance necessarily affects the sentencer's choice of life or death, for the weight of aggravating circumstances -- which is a critical guidepost for that choice -- is improperly increased by that error.

The Tenth Circuit correctly found that Oklahoma's statutory scheme is like Florida's:

The purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in *Zant*.... Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular murder. Okla. Stat. Ann. tit. 21, § 701.10 (West 1983). The sentencer must balance all of the statutory aggravating circumstances with all of the mitigating circumstances. Okla. Stat. Ann. tit. 21, § 701.11 (West 1983).

822 F.2d at 1480. Thus, Oklahoma, like Florida, "uses an aggravating circumstance to guide the discretion of the sentencer rather than to define which first degree murders are capital offenses." *Id.*¹¹

¹¹ The importance of the aggravating circumstances in guiding sentencing discretion in Oklahoma was further emphasized by the Tenth Circuit in *Parks v. Brown*, 823 F.2d 1405, 1415 (10th Cir. 1987), where the court read Oklahoma law as requiring the imposition of death if aggravating circumstances outweigh mitigating circumstances. Whether that reading of Oklahoma law is accurate is not a question raised in this proceeding; nevertheless, that Oklahoma law could reasonably be understood in this way simply emphasizes how important aggravating circumstances are in guiding the Oklahoma sentencer's discretion.

Stephens and *Barclay* also establish that the effect of a capital sentencer's reliance on an invalid aggravating circumstance depends "on the reasons that the aggravating circumstance at issue... [is] found to be invalid." *Stephens*, 462 U.S. at 864. Here, there is a critical distinction between errors of state law and errors of constitutional law. If the aggravating circumstance is invalid because it is federally unconstitutional, a "federal harmless-error analysis" must be applied, to determine whether the sentencer's consideration of the invalid circumstance was harmless beyond a reasonable doubt. *Barclay v. Florida*, 463 U.S. at 951 n.8 (referring to *Zant v. Stephens*, 462 U.S. at 884-89). If, on the other hand, the aggravating circumstance is invalid solely under state law, no such analysis is necessary, because "a 'mere error of state law' is not a denial of due process." *Id.*

In undertaking this part of the *Stephens* analysis in Mr. Cartwright's case, the Tenth Circuit was fully aware of the distinction to be made between state-law error and federal constitutional error. 822 F.2d at 1481-83. Categorizing the basis for invalidity of the "especially heinous" aggravating circumstance in Mr. Cartwright's case, the Tenth Circuit found that the circumstance was invalid because it failed to comport with the Eighth Amendment's requirement of meaningful channeling of capital sentencing discretion. *Id.* at 1482. Because the circumstance was invalidated on this ground, the Tenth Circuit correctly recognized that the burden then fell upon the State to show that the erroneous consideration of the circumstance was harmless beyond a reasonable doubt. *Id.* at 1482-83.

It was at this point that the Tenth Circuit concluded that the State could not make such a showing in Mr. Cartwright's case, because of "the function of the finding of an aggravating circumstance" in Oklahoma, *Stephens*, 462 U.S. at 864.¹² As the

¹² As we have already noted, the State did not even attempt to demonstrate that the erroneous consideration of the "especially heinous" circumstance was harmless in Mr. Cartwright's case.

court explained, "An aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer who must decide whether a particular murder merits life imprisonment or death for the defendant." Cartwright, 822 F.2d at 1482. Further, the Oklahoma courts have deemed that role so critical that they "have declined to reconsider... [the decision to impose death] on appeal when the sentencer improperly included an invalid aggravating circumstance in the balancing process." Id. Since the state appellate court does not consider that such an error can ever be harmless, it is plain that "[i]n such a system, reliance upon an aggravating circumstance that is invalid under the federal constitution could affect the balance struck by the sentencer," and cannot, therefore, be shown to be harmless beyond a reasonable doubt. Id. at 1482-83 (emphasis supplied).¹³ The Tenth Circuit was thus clearly correct in holding that the death sentence could not stand in this case.

The State does not contend that the Tenth Circuit's unanimous en banc opinion is contrary to this Court's opinions or constitutes a misstatement of Oklahoma law on the balancing issue. Rather, it attempts to create the appearance of a circuit conflict by misreading certain Fifth Circuit opinions.

The State devotes most of its second point, see Petition, at 38-49, to a claim that the Tenth Circuit's en banc opinion conflicts with Fifth Circuit decisions upholding death sentences under Louisiana law where one of several aggravating factors was invalid. The State argues that the Fifth Circuit reached this result even though in Louisiana "the jury weighs the aggravating circumstances against mitigating circumstances when determining whether to impose the death sentence." Petition, at 41-42.

¹³ This, of course, assumes that there are, in any particular case, mitigating circumstances against which aggravating circumstances are balanced, for only if there is a balancing between aggravation and mitigation is there a "balance struck by the sentencer" which is necessarily affected by the consideration of a constitutionally invalid aggravating circumstance. In Mr. Cartwright's case there were, indisputably, substantial mitigating circumstances.

But the very premise of the Fifth Circuit's decisions is that, as it reads Louisiana law, the Louisiana statute is not a balancing statute, as are the statutes of Florida and Oklahoma. According to the Fifth Circuit, Louisiana, like Georgia, merely uses an aggravating circumstance to determine the class of defendants who are eligible for capital punishment: a finding of one aggravating circumstance is adequate. In determining who among the eligible class are to be sentenced to death or life imprisonment, the Fifth Circuit has found that "Louisiana law does not require weighing of aggravating against mitigating circumstances."¹⁴ In contrast, Oklahoma makes all first-degree murderers eligible for the death sentence, and the statute specifically requires a weighing of aggravating and mitigating factors to decide which defendants should be sentenced to death or life imprisonment.

This critical difference between the function of the sentencer's finding of an aggravating circumstance in Oklahoma and Louisiana was pointed out here by the Tenth Circuit. Cartwright, 822 F.2d at 1480. The Tenth Circuit found that "the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murderers that are eligible for the death penalty." Id. at 1480. Oklahoma "uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular purpose." Id. at 1480.

It is this factor which distinguishes the differing decisions in the Fifth Circuit and the Tenth Circuit. There is no conflict to be resolved. A difference between state statutory schemes, rather than a difference in federal analytical

¹⁴ Wilson v. Butler, 813 F.2d 664, 674 (5th Cir. 1987). See also Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986), cited in Cartwright, 822 F.2d at 1480. Petitioner's strenuous efforts, see Petition, at 42-48, to impeach Wilson as incorrect and in conflict with other Fifth Circuit opinions is without merit. Moreover, assuming arguendo that the Fifth Circuit is wrong in its view of Louisiana law, the present certiorari petition is surely not the proper vehicle for dealing with that problem.

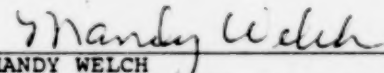
principles, accounts for the differing results in Cartwright and the Fifth Circuit cases cited by the State.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

November 22, 1987

Respectfully submitted,



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Attorney for Respondent
William Thomas Cartwright

(4)

Supreme Court, U.S.

FILED

FEB 25 1988

JOSEPH F. SPANGL, JR.
CLERK

No. 87-519

**In The
Supreme Court of the United States**
October Term, 1987

— 0 —
**GARY D. MAYNARD, and THE ATTORNEY
GENERAL OF THE STATE OF OKLAHOMA,**
Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT,
Respondent.

— 0 —
**ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

— 0 —
JOINT APPENDIX
— 0 —

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**PETITION FOR CERTIORARI FILED
SEPTEMBER 21, 1987
CERTIORARI GRANTED JANUARY 11, 1988**

**COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831**

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<u>Date</u>	<u>Description</u>
5- 5-82	Information filed in District Court of Muskogee County.
10-14-82	Order granting change of venue to Cherokee County.
10-18-82	Jury trial commences in the District Court of Cherokee County.
10-20-82	Jury returns verdict of guilty for crimes of Murder in the First Degree and Shooting With Intent to Kill.
10-21-82	Jury returns verdict imposing the punishment of death for the conviction of Murder in the First Degree.
10-25-82	Defendant is formally sentenced to death in accordance with the jury's verdict.
1- 7-85	Oklahoma Court of Criminal Appeals affirms the Defendant's conviction.
7- 1-85	United States Supreme Court denies the Defendant's Petition for Writ of Certiorari in Case No. 84-6171.
8-22-85	Defendant's Application for Post-Conviction Relief filed in the District Court of Muskogee County is denied.
10-23-85	Oklahoma Court of Criminal Appeals affirms the denial of the Defendant's Application for Post-Conviction Relief in Case No. PC-85-594. That opinion is reported as <i>Cartwright v. State</i> , 708 P.2d 592 (Okla. Crim. App. 1985).
1-13-86	United States Supreme Court denies Defendant's Second Petition for Writ of Certiorari in Case No. 85-5846.

<u>Date</u>	<u>Description</u>
2-11-86	United States District Court for the Eastern District of Oklahoma denies Defendant's Petition for a Federal Writ of Habeas Corpus.
9-29-86	United States Court of Appeals for the Tenth Circuit affirms the District Court's denial of the Petitioner's Petition for a Federal Writ of Habeas Corpus. That opinion is reported as <i>Cartwright v. Maynard</i> , 802 F.2d 1203 (10th Cir. 1986).
6-22-87	An en banc panel of the United States Court of Appeals for the Tenth Circuit vacates the original panel's opinion and vacates Defendant's death sentence in his appeal of the denial of his Petition for a Federal Writ of Habeas Corpus in Part. That opinion is reported as <i>Cartwright v. Maynard</i> , 822 F.2d 1477 (10th Cir. 1987) (en banc).

IN THE DISTRICT COURT IN AND FOR
MUSKOGEE COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)	
Plaintiff,)	
)	
vs.	)	CASE NO.:
	)	CRF-82-192
WILLIAM THOMAS	)	CRF-82-178
CARTWRIGHT,)	
)	
Defendant)	

(Filed May, 1982, 9:29 A.M.)

NADINE HARNAGE, COURT CLERK
21-701.7 21-652

INFORMATION For COUNT 1: MURDER IN THE
FIRST DEGREE COUNT 2: SHOOTING WITH THE
INTENT TO KILL

INFORMATION

STATE OF OKLAHOMA, COUNTY OF MUSKOGEE,
ss:

I, the undersigned District Attorney of said county, in the name, by the authority, and on behalf of the State of Oklahoma, give information that on about the 4th day of May A.D., 1982 in said County of Muskogee and State of Oklahoma, one WILLIAM THOMAS M. CARTWRIGHT did then and there unlawfully, wrongfully, willfully

COUNT I: that is to say, the said defendant, in the county and state aforesaid and on the day and year aforesaid, then and there being, with malice aforethought, did then and there wilfully, unlawfully and feloniously, without authority of law, effect the death of Hugh Riddle by then and there shooting him with a certain gun, to-wit: 20 gauge shotgun, of unknown brand name, then and there

and thereby inflicting certain mortal wounds in the body of the said Hugh Riddle, from which mortal wounds the same Hugh Riddle did languish and die on the 4th day of May, 1982,

COUNT 2: intentionally and feloniously shoot one Charma Riddle with a firearm, to-wit: a 20 gauge shotgun, the same being a deadly weapon loaded with gunpowder and shot, held in the hands of the said defendant and which he wrongfully and intentionally pointed, aimed and fired at the said Charma Riddle the pellets therefrom striking, penetrating and causing wounds in the body of the said Charma Riddle with the unlawful, wrongful, wilful and felonious intent then and there on the part of said defendant to kill said Charma Riddle, contrary to the form and statute in such cases made and provided and against the peace and dignity of the state.

STATE OF OKLAHOMA, COUNTY OF MUSKOGEE, ss:

I do hereby solemnly swear that I have read the above and foregoing information, know the content thereof, and that the statements therein contained are true.

X W.A. Edmonson
Subscribed and sworn to
before me this 5th day of
May, 1982.
NADINE HARNAGE,
COURT CLERK

BY: DEPUTY COURT
CLERK
PAULA SIXTH

I hereby state that I have examined the facts herein and recommend that a warrant issue.

MICHAEL C. TURPEN,
DISTRICT
ATTORNEY

BY: ILLEGIBLE
OFFICE OF THE
DISTRICT
ATTORNEY

WITNESSES FOR THE STATE OF OKLAHOMA

CHARMA RIDDLE, Fern Mtn. Rd., Muskogee,
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CHICK HAMILTON, 420 N. "M", Muskogee,
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LT. TOM SPRIGGS, MPD, CITY
CARL KELLY, MPD, CITY
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MEDICAL EXAMINER
EMERGENCY DOCTOR, MGH, DR. PAUL
COCHRAN, CITY 68-25501

IN THE DISTRICT COURT OF
MUSKOGEE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	(Filed October 5,
)	
PLAINTIFF,	)	1982 - 12:19 PM)
)	
—VS—	)	NO. CRF-82-192
)	
WILLIAM THOMAS	)	Nadine Harnage
CARTWRIGHT,	)	Court Clerk
)	
DEFENDANT,)	

AMENDED

NOTICE OF AGGRAVATING CIRCUMSTANCES
AND
BILL OF PARTICULARS

COMES NOW THE STATE OF OKLAHOMA, by and through the Office of the District Attorney and hereby serves notice that the State intends, pursuant to 21 OSA, Section 701.12, to show the following aggravating circumstances to justify imposition of the death penalty in the above-styled case:

1. The Defendant knowingly created a great risk of death to more than one person; to-wit: that there was another person in the home, Charma Riddle, who was severely injured and left for dead by the Defendant herein.
2. The murder was especially heinous, atrocious, or cruel for the following reasons, to-wit: that the offense took place within the home of the deceased, at night; that the deceased was only 30 years of age; that the close range shotgun blast

inflicted great pain and suffering; that the Defendant took steps to insure that his victim received no aid; and that the Defendant stalked the deceased for an extended period of time prior to the murder.

3. The existence of a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society; for the following reasons, to-wit: that following the fatal shot, the Defendant went to great lengths to effect the death of another individual, Charma Riddle, by slashing her throat, stabbing her body, and cutting off all avenues of aid or assistance known to the Defendant; and, further, that the Defendant attempted to effect his escape in the possession of two firearms stolen from the victims herein.

/s/ _____
W.A. EDMONDSON
FIRST ASSISTANT DISTRICT ATTORNEY
Dated this 5th day of October, 1982.

CERTIFICATE OF MAILING

I, W.A. Edmondson, do hereby certify that a copy of the foregoing Amended Notice of Aggravating Circumstances and Bill of Particulars was mailed, by prepaid U.S. Mail, to John Garrett, attorney for the Defendant herein, on the 5th day of October, 1982, at the address of 502 Court Street, Muskogee, OK 74401.

/s/ _____
W.A. EDMONDSON
FIRST ASSISTANT DISTRICT ATTORNEY

IN THE DISTRICT COURT OF
CHEROKEE COUNTY,
STATE OF OKLAHOMA.

STATE OF OKLAHOMA,)	
)	
PLAINTIFF,)	
	)	CASE NO.
-vs-	)	CRF-82-178
)	
WILLIAM THOMAS)	
CARTWRIGHT,)	
)	
DEFENDANT.)	
)	
_____)	

VERDICT

(Filed October 20, 1982)

We, the jury, duly empaneled upon our oaths, upon
Count 1 find the Defendant William Thomas Cartwright
guilty of Murder in the First Degree.

/s/ Bob J. Musgrave
FOREMAN

IN THE DISTRICT COURT
OF CHEROKEE COUNTY,
STATE OF OKLAHOMA.

STATE OF OKLAHOMA,)	
)	
PLAINTIFF,)	
	)	CASE NO.
-vs-	)	CRF-82-178
)	
WILLIAM THOMAS)	
CARTWRIGHT,)	
)	
DEFENDANT.)	
)	
_____)	

VERDICT

(Filed October 20, 1982)

We, the jury, duly empaneled upon our oaths, upon
Count 2 find the Defendant William Thomas Cartwright
guilty of Shooting with Intent to Kill and fix his punish-
ment at 75 years.

/s/ Bob J. Musgrove
FOREMAN

INSTRUCTION NO. 12

The defendant in this case has been found guilty by you, the jury, of the offense of Murder in the First Degree. It is now your duty to determine the penalty to be imposed for this offense.

Under the law of the State of Oklahoma, every person found guilty of Murder in the First Degree shall be punished by death or imprisonment for life.

INSTRUCTION NO. 13

In the sentencing stage of this trial, the State has filed a document called a Bill of Particulars. In this Bill of Particulars, the State alleges the defendant should be punished by death, because of the following aggravating circumstances:

1. The defendant knowingly created a great risk of death to more than one person;
2. The murder was especially heinous, atrocious, or cruel; and
3. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

INSTRUCTION NO. 14

The defendant has entered a plea of not guilty to the allegations of this Bill of Particulars, which casts on the

State the burden of proving the material allegations in this Bill of Particulars beyond a reasonable doubt.

This Bill of Particulars simply states the grounds upon which the State seeks imposition of the death penalty. It sets forth in a formal way the aggravating circumstances of which the defendant is accused. It is, in itself, not evidence that any aggravating circumstances exists, and you must not allow yourselves to be influenced against the defendant by reason of the filing of this Bill of Particulars.

The defendant is presumed to be innocent of the charges made against him in the Bill of Particulars, and innocent of each and every material element of said charges, and this presumption of innocence continues unless his guilt is established beyond a reasonable doubt. If, upon consideration of all the evidence, facts, and circumstances in the case, you entertain a reasonable doubt of the guilt of the defendant of the charges made against him in the Bill of Particulars, you must give him the benefit of that doubt and return a sentence of life imprisonment.

INSTRUCTION NO. 15

Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these Instructions.

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt,

you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life.

INSTRUCTION NO. 16

As used in these Instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

INSTRUCTION NO. 17

Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

INSTRUCTION NO. 17a

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such ag-

gravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed.

INSTRUCTION NO. 18

Evidence have been offered to the following mitigating circumstances:

- a. The defendant's youth;
- b. His prior record as a law abiding citizen;
- c. His willingness to have regular employment;

Whether these circumstances exist and whether these circumstances are mitigating must be decided by you.

INSTRUCTION NO. 19

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the law requires that you reduce such findings to writing by stating specifically what aggravating circumstances existed, if any. This finding must be made a part of your verdict.

You must indicate this finding by checking the box next to such aggravating circumstances on the appropriate form furnished you, and such verdict form must be signed by your foreman.

The law does not require you to reduce to writing the mitigating circumstances you find, if any.

INSTRUCTION: 20

In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the state and the defendant during the sentencing phase of this proceeding.

All the previous instructions given you in the first part of this trial apply where appropriate and must be considered together with these additional instructions. Together they contain all the law of any kind and the rules you must follow in deciding this case. You must consider them all together and not just a part of them.

You are the determiner of the facts. The importance and worth of the evidence is for you to decide.

I have made rulings during the second part of this trial. In ruling, I have not in any way suggested to you, nor intimated in any way, what you should decide. I do not express any opinion whether or not aggravating circumstances or mitigating circumstances did or did not exist, nor do I suggest to you in any way the punishment to be imposed by you.

You must not use any kind of chance in reaching a verdict, but you must rest in on the belief of each of you who agrees with it.

You have already elected a foreman. In the event you assess the death penalty, your verdict must be unanimous. You may also return a unanimous verdict of imprisonment for life. Proper forms of verdict will be given you which you shall use in expressing your decision, when

you have reached a verdict, all of you in a body must return it into open court.

The law provides that you shall now listen to and consider the further arguments of the attorneys.

/s/ Hardy Summers
10-21-82

• • •

Excerpts of Closing Argument of the Prosecutor
During the Second Stage of the Trial

(Tr. 626-28)

[p. 626] We allege secondly that the murder was especially heinous, atrocious, or cruel for the following reasons: That the offense took place within the home of the deceased at night. There's been no controversy in regard to that fact. No dispute but what the offense took place in the home of the victim at night. That the deceased was only thirty years of age. Ladies and Gentlemen, we did not put on specific evidence as to the age of the deceased. You have his pictures; you've seen his wife. You can gauge at least that he was a young man at the time he was cut down by the defendant's shotgun blast. And I submit that the fact that he was cut down in the prime of his life also tends to make this a particularly atrocious and cruel crime. That the close range shotgun blast inflicted great pain and suffering. That the defendant took steps to insure that his victim received no aid. Recall the photographs. Recall the testimony that after the deceased was shot, and after the other acts took place, the defendant proceeded to cut the telephone cord. Proceeded to cover the windows. Proceeded to place a note on the door saying they would be gone for two weeks. All designed with one purpose in mind. To keep aid from coming to Hugh and Charma Riddle. And I [p. 627] suggest that that makes this offense particularly heinous, atrocious, and cruel. And finally that the defendant stalked the deceased for an extended period of time prior to the murder. Recal' the testimony. The defendant was dropped off at 54th Street on the 3rd. There was no testimony as to where he was the night of the 3rd from any witness other than the defendant himself. And consider what the

Riddles found when they returned home on the 4th. Consider the phone bill which showed that at 11:30 in the morning on the 4th the telephone call was placed to Las Vegas. I suggest that the defendant was in the home at 11:30 that morning. Consider when Charma Riddle went back to the bedroom and tried to make the telephone call. The telephone was unplugged from underneath the bed. I asked her, Did you do that to avoid calls coming in and bothering you? She said, No, we never did that. Who did? I suggest the defendant had been in the house and unplugged the phone prior to any act being committed. Remember Charma's testimony about the television. Did you notice anything unusual when you arrived home? Only that the television was unplugged. Well, how does that work? You turn it on and each successive click of the remote control button causes the volume to go higher. I suggest that someone who was in the house and unfamiliar with that television set was watching it when the Riddles started down the driveway, tried to turn it off and it got [p. 628] louder instead and they pulled the plug on the television because they didn't know how to turn it off. And recall also the statement made by the defendant to Gary Sturm. What were you doing earlier? I was watching them through the window while they were eating dinner. Ladies and Gentlemen, I suggest that this defendant stalked Hugh Riddle for nearly two days before Hugh and Charma Riddle arrived home and he could effect the death of Hugh Riddle.

. . .

IN THE DISTRICT COURT IN AND FOR
CHEROKEE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA)
)
 Plaintiff,)
)
vs.) No. CRF-82-178
)
WILLIAM THOMAS CARTRIGHT,))
)
 Defendant.)
)
)

VERDICT

(Filed October 21, 1982)

We, the jury, impaneled and sworn in the above entitled cause, do upon our oaths unanimously find the following statutory aggravating circumstance or circumstances as shown by the circumstance or circumstances checked:

- ✓ The defendant knowingly created a great risk of death to more than one person;
- ✓ The murder was especially heinous, atrocious, or cruel;

— The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

/s/ Bob J. Musgrave
FOREMAN

IN THE DISTRICT COURT IN AND FOR
CHEROKEE COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA)
)
 Plaintiff,)
)
vs.) No. CRF-82-178
)
WILLIAM THOMAS CARTRIGHT,))
)
 Defendant.)
)
)

VERDICT

(Filed October 21, 1982)

We, the jury, empaneled and sworn in the above entitled cause, do upon our oaths, having heretofore found the defendant, William Thomas Cartright, guilty of Murder in the First Degree, fix his punishment at death.

/s/ Bob J. Musgrave
FOREMAN

William Thomas
CARTWRIGHT, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. F-82-758.

Court of Criminal Appeals of Oklahoma.

Jan. 7, 1985.

Rehearing Denied March 8, 1985.

OPINION

BUSSEY, Presiding Judge:

William Thomas Cartwright was charged in the District Court of Muskogee County, Oklahoma, for the crimes of Murder in the First Degree, and Shooting with Intent to Kill, Case No. CRF-82-192. He was granted a change of venue to Cherokee County, Oklahoma. The jury before which he was tried returned verdicts of guilt on both counts, sentenced him to death for the murder, and to a term of seventy-five years' imprisonment for the shooting. He was sentenced accordingly.

The appellant began working for the victims in this case, Hugh and Charma Riddle, in their Muskogee remodeling business in July of 1981. His employment was terminated in December of that year. According to the appellant, he was fired because he demanded the Riddles pay for an injury he allegedly received on the job. According to Charma Riddle, he was laid off because of lack of business.

The appellant moved to Las Vegas, Nevada in January of 1982. He returned to Muskogee in late April, supposedly believing his claim against the Riddles for injury would be settled. He told a Muskogee acquaintance that he intended to "get even" with the Riddles.

On May 3, 1982, Hugh and Charma Riddle spent the night with Charma's father in Muskogee. They did not return to their rural Muskogee home until the early evening hours of May 4. They ate their evening meal and retired to watch television. As Charma made her way to the bathroom from the living room, she was confronted by a man in her hallway with a shotgun. She grabbed the gun, and the man fired it into her leg. After she fell, she saw her assailant and recognized him as the appellant. He shot her again.

Charma then saw the appellant walk into the living room where Hugh was. She saw the appellant fire two blasts from the shotgun, and heard her husband scream.

The appellant disappeared into the living room, and Charma dragged herself down the hall into a bedroom. She tried to use the telephone, but it was dead. She then began to write her assailant's name on the bedsheet in her blood. She managed to spell the letters TOM CAR.

The appellant entered the bedroom. Charma asked him why he had shot them, and he replied that they should not have fired him. Charma then asked the appellant to help her. The appellant slit her throat and stabbed her with the hunting knife the Riddles had given him for Christmas.

Miraculously still alive, Charma heard the telephone ring in another room. She deduced that the telephone she

had tried to use earlier was only unplugged. She plugged it in and called an operator, who contacted the Muskogee police department. She told the police dispatcher that Tom Cartwright had shot her, and that he was still in the house.

Pursuant to the directions Charma gave, Muskogee County Sheriff's officers and Muskogee police officers arrived at the house. The first officer who arrived observed a man standing outside the Riddle home. The man dodged between trees before disappearing into the darkness. A subsequent search for him was fruitless.

Clothing, weapons and other possessions belonging to the Riddles were found inside their vehicle. Found along with these articles was a silver jacket which was identified as being similar or identical to one the appellant owned.

The officers found the body of Hugh Riddle lying face down in the living room inside the Riddle home. Charma was still in the bedroom. She was taken by ambulance to the Muskogee Hospital. She lived to testify against the appellant at trial.

Two days after the murder/shooting (May 6, 1982), the appellant called his sister from a pay telephone in Muskogee. The sister picked him up, fed him, gave him a change of clothes and called the Muskogee County District Attorney. The District Attorney came to the sister's house, and got the appellant. The appellant was taken to jail, but then was taken to the hospital because he complained of a headache and a leg injury. After a doctor had seen him and prescribed aspirin, the appellant was taken to the courthouse for interrogation. He confessed to the crimes during the interrogation.

The Riddles' telephone bill for the month of May, 1982 was introduced into evidence to demonstrate that at 11:13 a.m. on May 4, a telephone call was placed to a Las Vegas, Nevada telephone number. It was established that the number belonged to the appellant's fiancée.

A note which was found tacked to the door of the Riddle residence by Charma's father on May 6 was introduced into evidence. The note contained several misspellings, and stated that the Riddles had made an emergency trip to Tennessee. Charma testified that although she and Hugh had planned a trip to Tennessee at some point in the coming year, they were not about to make such a trip, and neither of them had written the note. The appellant was requested to write the same words that the note contained at trial. He misspelled several words, including the identical misspelling of the word "such," which was spelled "sutch" in both notes.

The appellant testified that he spoke with Hugh Riddle in the late afternoon of May 4, concerning his alleged injury. Hugh ordered him off his property, and as he turned to leave, he was struck on the head. He stated that he remembered nothing until May 6, when he called his sister.

Upon cross examination, the prosecutor read several excerpts of the appellant's confession for the purpose of impeaching his testimony concerning the two day "black-out." The appellant stated he did not remember making any of the statements.

The appellant presented lay testimony that, due to a childhood injury, he had a "soft spot" on his head, which,

when touched, caused him to "black out." Also, several relatives, employees, supervisors and co-workers testified that he was a good worker, and that he was not a violent person. -

The appellant first complains that the confession he made on May 7 was involuntary, and therefore inadmissible for any purpose, because he was not aware he was talking to law enforcement authorities. He contends that he consented to interrogation by the District Attorney because he was convinced by his sister that the District Attorney was an attorney who wanted to help him.¹

1. The appellant's contact with the Muskogee County District Attorney (hereinafter called the D.A.) was engineered by his sister, Dovie Field. Shortly after the murder/shootings, a close friend of the Riddles contacted Dovie and threatened to kill her and her brother. She contacted the police who, after some investigation, told her to file a complaint at the courthouse. At the courthouse, the D.A.'s secretary learned who Dovie was, and directed her to the D.A.'s office. Dovie and the D.A. discussed the appellant, and she agreed to contact the D.A. when she saw him. According to Dovie, at that time she knew the D.A. was a District Attorney, but thought that meant he was a "higher up attorney"; and that he wanted to help the appellant.

Approximately one hour after Dovie picked the appellant up on May 6, she persuaded the appellant to meet with the D.A. She then called the D.A., told him the appellant was at her home, and admonished him to bring no police or guns. When the D.A. arrived, Dovie's husband, Steve, asked the D.A. if he were the prosecuting attorney. The D.A. replied that he was a prosecutor, but that he did not know whether he would be prosecuting the appellant's case. Dovie, the appellant and the D.A. then drove to the police station in the D.A.'s car. Steve followed along behind in his.

The appellant was taken from the police station to the hospital by the D.A., an investigator for the D.A. and a uni-

(Continued on following page)

From a review of the testimony had at trial and on the motion to suppress the confession, we are convinced that the circumstances surrounding the appellant's interrogation indicate that he was coherent, and doubtless knew that he was dealing with law enforcement officials.²

The portions of the confession were therefore properly utilized for purposes of impeachment. No objection was made to the trial court's instructions concerning the substantive use of the confession, or to the prosecutor's remarks concerning such use. Thus, any error was waived. *Jetton v. State*, 632 P.2d 432 (Okla.Cr.1981). Moreover, in view of both the direct and circumstantial evidence of the appellant's guilt independent of the portions of the confession used at trial, we are convinced that any possible error which may have occurred was harmless beyond a

(Continued from previous page)

formed policeman. A doctor examined the appellant, suggested he take some aspirin and released him. Hospital personnel testified at trial that the appellant was coherent. When asked, the appellant agreed to talk, and chose to go to the courthouse rather than back to jail. On the way, the appellant observed and commented upon an accident they passed. Inside the courthouse, the appellant was informed that his interrogator was an investigator for the D.A., and he acknowledged the presence of the uniformed police officer. He was read his rights. He signed a written waiver, and acknowledged the police officer's signature as a witness.

2. See footnote 1, *infra*.

It is also interesting to note that the appellant testified that he was abused as he climbed the stairs to the courthouse, that he was shouted at prior to the tape recorded interrogation and that he was told the uniformed police officer saw only what he was told to see. Without deciding whether the allegations are true, we would only comment that these circumstances support the conclusion that the appellant knew he was not in the hands of a defense attorney.

reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Coleman v. State*, 668 P.2d 1126 (Okla.Cr.1983).

The appellant's third assignment of error is that the failure to file a bill of particulars by the time of the preliminary hearing, or to present evidence in support thereof at the preliminary hearing, deprived the trial court of jurisdiction to sentence him to death. We have previously held that defendants in capital cases are not entitled to preliminary hearings on bills of particular. *Stafford v. State*, 669 P.2d 285 (Okla.Cr.1983), vacated and remanded on other grounds, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 359 (1984); *Coleman*, supra; *Johnson v. State*, 665 P.2d 815 (Okla.Cr.1983); *Brewer v. State*, 650 P.2d 54 (Okla.Cr. 1982). The bill of particulars, filed on October 4, 1982, complied with the requirements of 21 O.S.1981, § 701.10.³ The allegations contained therein consisted of the facts of the case, and inferences permissibly drawn therefrom. Further, we do not believe there was any surprise or prejudice to the appellant, since trial counsel neither raised an objection concerning the matter prior to trial or in the motion for new trial. The allegation is without merit.

The appellant's second assignment of error is that the trial court erroneously failed to instruct the jury that the trial court would impose a life sentence if a unanimous verdict were not reached on the issue of punishment.

The instructions given by the trial court accurately and adequately addressed the matter. The instructions stated, in pertinent part:

3. Title 21 O.S.1981, § 701.10 states, in pertinent part that, "Only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life. (Instr. No. 15, Tr. 620).

• • •

If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the death penalty shall not be imposed. (Instr. No. 17(a), Tr. 621).

This assignment of error has no merit.

The appellant's ninth allegation of error proceeds upon the following two premises: first, in the guilt stage, the trial court ruled certain testimony by the appellant's mother and sister inadmissible;⁴ and second, all the testimony presented by the appellant in the guilt stage was incorporated by stipulation as mitigating evidence in the punishment stage. Citing *Lockett v. Ohio*, 438 U.S. 586,

4. The trial court refused to allow the appellant's mother to testify to the appellant's character and disposition as compared to his siblings'. The mother was allowed to testify, as were several other witnesses, that the appellant had a non-violent disposition.

The trial court also refused to allow the appellant's sister to give testimony in rebuttal, which defense counsel admitted would be nothing different or new from her testimony given during the case in chief.

98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), appellate counsel therefore concludes that, by virtue of the trial court's rulings in the guilt stage, the appellant's right to present evidence in mitigation of the death penalty was unconstitutionally curtailed.

The trial court's rulings in the guilt stage were correct. See, 12 O.S.1981, § 2403, footnote 4 *supra*. Additionally, there is no argument in either the record or upon this appeal to indicate that counsel was, or even considered himself to be, prohibited from presenting that evidence in the second stage, had he thought it necessary or useful. The argument that alleged error was "bootstrapped" into the punishment stage by a voluntary stipulation is utterly devoid of merit.

We now turn to our statutorily mandated review of whether the sentence of death was appropriate in this case. See, 21 O.S.1981, § 701.13(C)(1-3).

We first find from a review of the transcript that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The appellant was granted a change of venue to ensure his trial was removed from the arena of public prejudice in Muskogee County. The trial court, prosecutor and defense counsel all performed their duties admirably, and the appellant received a fair trial.

Secondly, we must determine whether the evidence supported the jury's determination that the murder of Hugh Riddle was especially heinous, atrocious or cruel, and that the appellant knowingly created a risk of death to more than one person. The appellant has also raised

these considerations in his fourth and sixth allegations of error, respectively.

In assessing whether the murder was especially heinous, atrocious or cruel, the appellant would have us consider the shooting as an isolated event, to-wit: that the appellant walked into a room and shot Hugh Riddle at close range with a shotgun, killing him almost immediately. He would therefore have us conclude under *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) and *Odum v. State*, 651 P.2d 703 (Okla.Cr.1982) that the murder was not tortuous, and therefore was not especially heinous, atrocious or cruel.

According to the plurality in *Godfrey v. Georgia*, the Georgia Supreme Court had defined the aggravating circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" essentially to mean that torture must have been involved in the murder. *Godfrey*, 446 U.S. at 431, 100 S.Ct. at 1766. This Court has not defined the "especially heinous atrocious or cruel" aggravating circumstance in such a manner. The statute is written in disjunctive language, and we have defined "heinous" as "extremely wicked or shockingly evil"; "pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others." *Eddings v. State*, 616 P.2d 1159 (Okla.Cr. 1980), remanded for resentencing 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

While it is true that torture may be a sufficient factor to justify a finding that the murder was especially heinous, atrocious or cruel, (see *Stafford v. State*, 665 P.2d 1205

(Okl.Cr.1983), wherein the defendant marched six persons into a meat locker and opened fire, amidst the screams for help; and *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982), wherein the defendant shot his victim at point blank range, and mocked him as he bled to death), it is not a necessary one. In *Eddings v. State*, 616 P.2d 1159 (Okl.Cr.1980), this Court held that the fact that the victim was a police officer rendered the crime especially heinous, atrocious or cruel under the above definitions.

This Court held in *Boutwell v. State*, 659 P.2d 322 (Okl.Cr.1983), that the murder of a convenience store clerk was "especially heinous, atrocious or cruel," because the defendant, who knew the victim, planned the murder well in advance. In *Davis v. State*, 665 P.2d 1186 (Okl.Cr.1983), this Court held that the defendant's act of shooting his victims several times was "atrocious." In *Jones*, supra, we held that the defendant's acts of shooting three persons in a barroom for no apparent reason was "extremely wicked" and "shockingly evil." In *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980), we held that the manner in which the victims were killed, coupled with the demands for ransom and the manner in which the bodies were disposed of justified the imposition of the death sentence, when one of the aggravating circumstances found was that the murder was especially heinous, atrocious or cruel.

Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gage whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles;

that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. See as well our discussion in *Nuckols v. State*, 690 P.2d 463, 55 O.B.A.J. 2259 (Okl.Cr.1984), of the consideration to be given to the manner of a killing in determining whether a murder is heinous, atrocious or cruel.

Likewise, it is apparent from these facts that the appellant's murderous escapade created a great risk of death to more than one person. Evidence at trial, which was subsequently incorporated by reference into the punishment stage, established that when Charma arrived at the hospital, her blood pressure was almost nonexistent and that she would have died had she arrived any later. The fact that the two victims were not together in the same room when the appellant shot them is immaterial, in light

of the close proximity of the victims, and rapid and fluid nature of the appellant's attack.⁵

Thirdly, we hold the sentence of death in this case not to be excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.⁶ See *Stout v. State*, 693 P.2d 617 (Okla. Cr. 1984), wherein defendant broke into his sister's and brother-in-law's home and beat their brains out; *Nuckols v. State*, supra, wherein defendant stopped to help a motorist, drank a beer with him, visited with him, and then with co-defendant attacked victim with a ball peen hammer, hitting and kicking victim to death; *Stafford v. State*, 669 P.2d 285 (Okla. Cr. 1983) vacated and remanded on other

5. The appellant argues in his seventh assignment of error that the trial court's failure to provide any definition for the "knowingly created a great risk of death to more than one person" aggravating circumstance unconstitutionally afforded the jury uncontrolled discretion, within the meaning of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

This argument has been raised for the first time on appeal. It is therefore not properly before us. *McDuffie v. State*, 651 P.2d 1055 (Okla. Cr. 1982). Moreover, as the State asserts, there was no reason to request such an instruction. The constitutionality of the statute has been upheld against arguments that it is overly broad. See, *Burrows v. State*, 640 P.2d 533 (Okla. Cr. 1982); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

6. The appellant's fifth assignment of error is that this Court has been evaluating the heinous, atrocious or cruel aggravating circumstances (21 O.S. 1981, § 701.12(4)) in an arbitrary manner. We have considered the argument to the extent that it applies to our consideration of whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S. 1981, § 701.13(C)(3). Beyond this, the appellant has no standing to complain of decisions reached in other cases.

grounds, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 359 (1984), wherein the defendant emerged from hiding and shot a family when they stopped along the roadside to help a person they believed to be in distress; *Coleman v. State*, supra, wherein the defendant murdered a man and woman who walked in on him as he was burglarizing their residence; *Davis v. State*, 665 P.2d 1186 (Okla. Cr. 1983), cert. denied, — U.S. —, 104 S.Ct. 203, 78 L.Ed.2d 177, wherein, after a prior altercation, the defendant shot and killed two persons as they were moving his estranged wife's property from his apartment; *Ake v. State*, 663 P.2d 1 (Okla. Cr. 1983), wherein the defendant and his accomplice gained entry into their victims' home, tied them up, and shot the four of them, killing two; and *Hays v. State*, 617 P.2d 223 (Okla. Cr. 1982), wherein the defendant assaulted some motorists with a pistol after having robbed and killed a store owner. We also find that the appellant's conduct was much more egregious than that of the defendant in *Odum v. State*, 651 P.2d 703 (Okla. Cr. 1982), wherein the defendant approached the pickup in which the victim was riding and, from the outside, fired one shot through his neck, and left the scene.⁷

7. We have also compared this case with the following cases and found the sentence of death herein is not excessive or disproportionate: *Robison v. State*, 677 P.2d 1080 (Okla. Cr. 1984), cert. denied, — U.S. —, 104 S.Ct. 3524, 82 L.Ed.2d 831; *Stafford v. State*, 665 P.2d 1205 (Okla. Cr. 1983), vacated and remanded on other grounds, — U.S. —, 104 S.Ct. 2652, 81 L.Ed.2d 359 (1984); *Parks v. State*, 651 P.2d 686 (Okla. Cr. 1982), cert. denied, 459 U.S. 1155, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983); *Jones v. State*, 648 P.2d 1251 (Okla. Cr. 1983) cert. denied, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002; and, *Chaney v. State*, 612 P.2d 269 (Okla. Cr. 1980), cert. denied, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 219 (1981).

In view of the above, we hold that the appellant's eighth assignment of error, that modification is mandated if one of the two aggravating circumstances falls, must be dismissed.

The judgments and sentences are AFFIRMED.

BRETT, J., concurs.

PARKS, J., concurs in results.

William Thomas CARTWRIGHT, Petitioner-Appellant,

v.

Gary D. MAYNARD, Warden, Oklahoma State Penitentiary at McAlester, Oklahoma, and Robert Henry, successor to Michael C. Turpen, Attorney General of Oklahoma, Respondents-Appellees.

No. 86-1231.

United States Court of Appeals, Tenth Circuit.

June 22, 1987.

Before HOLLOWAY, Chief Judge, and BARRETT, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA and BALDOCK, Circuit Judges.

ON REHEARING EN BANC

TACHA, Circuit Judge.

Petitioner William Thomas Cartwright appeals from the denial of habeas corpus relief by the United States District Court for the Eastern District of Oklahoma. Cartwright was convicted of the murder of Hugh Riddle and sentenced to death following a determination that the murder satisfied two statutory aggravating circumstances and that these aggravating circumstances outweighed the mitigating evidence. Cartwright alleges that the state of Oklahoma applied the "especially heinous, atrocious, or cruel" aggravating circumstance in a unconstitutionally vague and overbroad manner in this case. We agree.

Cartwright was tried and convicted of first degree murder for the shooting of Hugh Riddle.¹ The state ar-

1. Cartwright was also convicted of shooting Charma Riddle with intent to kill. He was sentenced to seventy-five years imprisonment for that crime.

gued that three of the aggravating circumstances enumerated under Oklahoma law justified the imposition of the death penalty: first, the defendant knowingly created a great risk of death to more than one person; second, the murder was "especially heinous, atrocious, or cruel;" and third, the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. See Okla.Stat. Ann. tit. 21, §§ 701.12(2), (4), (7) (West 1983). The jury concluded that the first two aggravating circumstances were established, but that the evidence did not support the third aggravating circumstance. The jury then weighed the aggravating circumstances and the mitigating circumstances and sentenced Cartwright to death for the murder of Hugh Riddle.

The Oklahoma Court of Criminal Appeals affirmed the convictions and the sentences on appeal. *Cartwright v. State*, 695 P.2d 548 (Okla.Crim.App.), cert. denied, 473 U.S. 911, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985). The state courts then denied Cartwright's application for post-conviction relief. *Cartwright v. State*, 708 P.2d 592 (Okla.Crim.App.1985), cert. denied, — U.S. —, 106 S.Ct. 837, 88 L.Ed.2d 808 (1986). The United States District Court for the Eastern District of Oklahoma denied Cartwright's petition for a writ of habeas corpus. A panel of this court affirmed the denial of the petition. *Cartwright v. Maynard*, 802 F.2d 1203 (10th Cir.1986). We granted rehearing *en banc* on the question of the application of the "es-

pecially heinous, atrocious, or cruel" aggravating circumstance.²

There are three questions presented in this appeal. First, we must decide whether reliance upon an unconstitutionally vague or overbroad statutory aggravating circumstance required the reversal of a death sentence where the sentencer was required to balance the aggravating circumstances with the mitigating circumstances. Second, if such reliance requires that the death sentence be vacated, we must then decide whether the Oklahoma courts in this case applied a constitutionally adequate narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case. Finally, if the state courts failed to apply a proper narrowing construction, we must decide whether this court can apply a narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case.

For the reasons stated in this opinion, we conclude that: (1) reliance upon a constitutionally invalid aggravating circumstance requires that the death sentence be vacated; (2) the Oklahoma courts failed to apply a constitutionally adequate narrowing construction in this case; and (3) this court cannot decide what narrowing construction is to be applied by the state of Oklahoma. We there-

2. The previous panel decision disposed of all six of Cartwright's suggested grounds for habeas relief. See *Cartwright v. Maynard*, 802 F.2d at 1209-22. We do not disturb the decision of the panel regarding five of those issues. We only consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was vague and overbroad in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

fore remand to the district court with directions to enter judgment in accord with this opinion.

I.

Cartwright was sentenced to death after two statutory aggravating circumstances were established. If Cartwright's death sentence can rest on the unchallenged aggravating circumstance of creating a great risk of death to more than one person, we need not reach the constitutional challenge to the "especially heinous, atrocious, or cruel" aggravating circumstance. *See, e.g. Superintendent, Massachusetts Correctional Inst. v. Hill*, 472 U.S. 445, 450, 105 S.Ct. 2768, 2771, 86 L.Ed.2d 356 (1985) (a federal court will address a constitutional question only when it is necessary to the resolution of the case before the court). Thus, we must first decide whether the unchallenged aggravating circumstance supports the death sentence even if the challenged aggravating circumstance were found to be invalid.

The validity of a death sentence based in part on consideration of an invalid aggravating circumstance "depends on the function of the jury's finding of an aggravating circumstance under [a state's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue . . . was found to be invalid." *Zant v. Stephens*, 462 U.S. 862, 864, 103 S.Ct. 2733, 2736, 77 L.Ed.2d 235 (1983); *see also Barclay v. Florida*, 463 U.S. 939, 951, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983); *accord Andrews v. Shulsen*, 802 F.2d 1256, 1263 (10th Cir.1986). The Supreme Court has addressed this question under Georgia law in *Zant* and under Florida law in *Barclay* and

Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1984). We are presented with the same question under the law of Oklahoma.

Under the Georgia statute reviewed in *Zant*, first degree murder is not necessarily a capital offense. The death penalty can be imposed for first degree murder only if at least one statutory aggravating circumstance is established. A statutory aggravating circumstance is used simply to cross the threshold dividing first degree murders that are not eligible for the death penalty and first degree murders that are eligible for the death penalty. It does not matter how many statutory aggravating circumstances are present—only one is needed to cross the threshold. Therefore, as long as one valid aggravating circumstance remains, the murder is a capital offense even if other aggravating circumstances are subsequently found invalid.

Moreover, an aggravating circumstance under the Georgia statute is used only to determine which first degree murders are capital offenses. An aggravating circumstance does not play the additional role of guiding the sentencer in the exercise of its statutory discretion in deciding whether to sentence a particular murderer to life imprisonment or to death. No particular aggravating circumstance is afforded special weight. There is no requirement that aggravating circumstances be balanced against mitigating circumstances. *See Zant*, 462 U.S. at 873-74, 103 S.Ct. at 2740-41.

The *Zant* Court held that two valid aggravating circumstances served the constitutionally required function of narrowing the class of persons eligible for the death

penalty even though a third aggravating circumstance—that the defendant had “a substantial history of serious assaultive criminal convictions”—had been held unconstitutionally vague. *Id.* at 878-79, 103 S.Ct. at 2743-44. Once the class of persons eligible for the death penalty has been determined, “the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.” *Id.* at 878, 103 S.Ct. at 2743 (footnote omitted). The Court then held that the evidence of the defendant’s prior criminal record, while not a valid statutory aggravating circumstance, could be considered by the sentencer in selecting the proper punishment. Thus, although the defendant’s prior criminal record was improperly considered as a statutory aggravating circumstance, the Court allowed the jury to consider such evidence in deciding whether to impose the death penalty. Labeling the evidence of a prior criminal record as a statutory aggravating circumstance “arguably might have caused the jury to give somewhat greater weight to respondent’s prior criminal record than it otherwise would have given,” but that possibility did not rise to the level of constitutional error. *Id.* at 888-89, 103 S.Ct. at 2749.

The purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in *Zant*. An aggravating circumstance under the Oklahoma scheme does not establish a threshold that distinguishes capital murders from other first degree murders. In Oklahoma *any* first degree murder is pun-

ishable by life imprisonment or death. Okla.Stat. Ann. tit. 21, § 701.9 (West 1983). Therefore, the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murderers that are eligible for the death penalty. See *Zant*, 462 U.S. at 875, 103 S.Ct. at 2741 (Georgia), *Andrews*, 802 F.2d at 1263 (Utah); *Welcome v. Blackburn*, 793 F.2d 672, 677 (5th Cir.1986) (Louisiana). Cf. *Johnson v. Thigpen*, 806 F.2d 1243, 1248 (5th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987) (Mississippi).

Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular murder. Okla.Stat. Ann. tit. 21, § 701.10 (West 1983). The sentencer must balance all of the statutory aggravating circumstances with all of the mitigating circumstances. Okla. Stat. Ann. tit. 21, § 701.11 (West 1983). *Zant* does not determine the effect of consideration of an unconstitutional statutory aggravating circumstance under the Oklahoma statute, for the Court in *Zant* carefully observed that it did “not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is ‘invalid’ under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.” 462 U.S. at 890, 103 S.Ct. at 2750; see also *id.* at 873-74 n. 12, 103 S.Ct. at 2741 n. 12.

Florida, like Oklahoma, uses an aggravating circumstance to guide the discretion of the sentencer rather than

to define which first degree murders are capital offenses. In this respect the Oklahoma statute is similar to the Florida statute reviewed by the Supreme Court in *Barclay* and *Goode*. Nevertheless, this case differs from *Barclay* and *Goode* in two important respects. First, the Oklahoma courts do not reweigh the aggravating and mitigating circumstances after an aggravating circumstance has been found invalid. Second, this case involves an allegation that an aggravating circumstance is invalid under the federal constitution rather than state law.

In *Barclay*, the trial judge found several aggravating circumstances but no mitigating circumstances and sentenced the defendant to death. The State conceded before the Supreme Court that one of the aggravating circumstances relied upon by the state courts—Barclay's criminal record—was not a statutory aggravating circumstance under state law. *Barclay*, 463 U.S. at 946, 103 S.Ct. at 3422. In cases where no mitigating circumstances were found, the Florida courts had held that the effect of a sentencer's erroneous consideration of an improper aggravating circumstance would be determined by a harmless error analysis. *Elledge v. State*, 346 So.2d 998, 1002-03 (Fla. 1977), cited in *Barclay*, 463 U.S. at 955, 966 n. 12, 103 S.Ct. at 3427 n. 12.

The Supreme Court held that this procedure satisfied the constitutional demand of "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Barclay*, 463 U.S. at 958, 103 S.Ct. at 3429 (plurality opinion of Rehnquist, J., with Burger, C.J., & White & O'Connor, JJ.); *id.* at 967, 103 S.Ct. at 3433 (Stevens, J., with Powell, J., concurring

in the judgment) (quoting *Zant*, 462 U.S. at 879, 103 S.Ct. at 2744) (emphasis original). Justice Rehnquist wrote that because the aggravating circumstance was invalid only under state law,

[T]his case is distinguishable from *Zant v. Stephens* . . . where one of the three aggravating circumstances found in Georgia state court was found to be invalid under the Federal Constitution. Of course, a "'mere error of state law' is not a denial of due process." Thus we need not apply the type of federal harmless-error analysis that was necessary in *Zant*. . . .

Id. at 951 n. 8, 103 S.Ct. at 3425 n. 8 (citations omitted). The plurality then noted that while state law prohibited a sentencer from considering nonstatutory aggravating circumstances, *id.* at 954, 103 S.Ct. at 3427, "nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record." *Id.* at 956, 103 S.Ct. at 3428; see also *id.* at 966-67, 103 S.Ct. at 3433-34 (Stevens, J., concurring in the judgment). The plurality concluded that consideration of an aggravating circumstance invalid under state law did not render the balancing unconstitutional because "[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Id.* at 958, 103 S.Ct. at 3429. Justice Stevens agreed that one valid aggravating circumstance could constitutionally support a death sentence on appeal if no statutory mitigating circumstances had been found. *Id.* at 967-68, 103 S.Ct. at 3433-34.

In *Goode*, the Supreme Court again considered the application of the Florida statute. One aggravating cir-

cumstance had been found invalid under state law in *Goode*, as in *Barclay*, but mitigating circumstances were present in *Goode*, unlike *Barclay*. The Florida Supreme Court had indicated that it would perform a harmless error analysis only if there were no mitigating circumstances. See *Barclay*, 463 U.S. at 954-55, 103 S.Ct. at 3427. In *Goode*, on the other hand, the Florida Supreme Court independently rebalanced the valid aggravating circumstances with the mitigating circumstances. The United States Supreme Court recognized that "there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [an invalid aggravating circumstance]." *Goode*, 464 U.S. at 86-87, 104 S.Ct. at 383. Thus, the death sentence was constitutionally permissible.

Two of the elements relied upon in *Barclay* and *Goode* are absent in this case. First, unlike the Florida courts, the Oklahoma courts have been "unwilling to speculate as to the effect the improper aggravating circumstance . . . had on the jury's recommendation to impose the death penalty." *Johnson v. State*, 665 P.2d 815, 827 (Okla.Crim. App.1983).³ The Oklahoma Court of Criminal Appeals

3. At the time that Cartwright was sentenced, the Oklahoma Court of Criminal Appeals had a statutory obligation to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Okla.Stat. Ann. tit. 21, § 701.13(C)(3) (West 1983). The court held that Cartwright's death sentence was not "excessive or disproportionate to the penalty imposed in similar cases." *Cartwright v. State*, 695 P.2d at 555.

The state asserts that this "proportionality review" would save the death sentence in this case even if one of the aggra-

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has held that if an aggravating circumstance used in the balancing by the sentencer is found invalid on appeal, the death penalty must be modified to life imprisonment. *Id.* The Oklahoma courts have refused to apply a harmless error analysis or to independently reweigh the aggravating and mitigating circumstances. Thus, Oklahoma has no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance.

The Arkansas courts have also concluded that they "are not in a position to speculate about what the jury might have done if it had found only two aggravating circumstances instead of three." *Williams v. State*, 274 Ark. 9, 12, 621 S.W.2d 686, 687 (Ark.1981), *cert. denied*, 459 U.S. 1042, 103 S.Ct. 460, 74 L.Ed.2d 611 (1982), *quoted in Collins v. Lockhart*, 754 F.2d 258, 267 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). In *Collins*, the Eighth Circuit held that one of the aggra-

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vating circumstances is found to be unconstitutionally vague or overbroad. *Zant* and *Barclay* noted that the state appeals courts in those cases had performed a proportionality review. *Zant*, 462 U.S. at 879-80, 103 S.Ct. at 2743-44; *Barclay*, 463 U.S. at 958, 972-74, 103 S.Ct. at 3436-37. Neither decision, however, suggested that a proportionality review could serve as an independent basis for upholding a death sentence imposed after reliance upon an unconstitutional aggravating circumstance. *Zant* emphasized the special role of an aggravating circumstance in *Georgia*. 462 U.S. at 879, 103 S.Ct. at 2743. *Barclay* emphasized that the Florida Supreme Court had considered only the valid aggravating circumstances in rebalancing on appeal. *Barclay*, 463 U.S. at 958, 103 S.Ct. at 3429. Moreover, since *Zant* and *Barclay* it has been established that a proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). We conclude that the proportionality review in this case would not save the death penalty because reliance upon the allegedly unconstitutional aggravating circumstances was not cured on appeal.

vating circumstances relied upon by the Arkansas courts in imposing a death sentence was unconstitutional. The court then considered the effect of this holding in light of the presence of other valid aggravating circumstances. After examining the statutes at issue in *Zant* and *Barclay*, the court concluded:

In Arkansas, the practice is decisively different. Here, unlike Georgia, weighing does take place. . . . Furthermore, unlike the practice in Florida, if an aggravating circumstance is held invalid for any reason, the Supreme Court of Arkansas does not engage in any sort of harmless-error analysis. The death penalty is automatically reduced to life imprisonment, unless the state chooses to retry the question of punishment to a second jury.

Collins, 754 F.2d at 267. The court then held that "[t]he reasoning underlying [*Zant v.*] *Stephens* and *Barclay* is therefore inapplicable here, and the presence of an invalid aggravating circumstance means that the sentence of death cannot stand." *Id.*

The second difference between this case and *Barclay* and *Goode* lies in the reason that an aggravating circumstance is invalid. The plurality in *Barclay* emphasized that the particular aggravating circumstance at issue was invalid under state law. *Barclay*, 463 U.S. at 951 n. 8, 103 S.Ct. at 3425 n. 8. See also *Goode*, 464 U.S. at 86, 104 S.Ct. at 383. Cartwright alleges that the "especially heinous, atrocious, or cruel" aggravating circumstance violates the federal constitution. We agree that "*Zant* and *Barclay* leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances." Spe-

cial Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L.Rev. 1129, 1181 (1984).

The Supreme Court's decisions show that the particular function of an aggravating circumstance in a state's capital punishment system determines the effect of reliance upon an unconstitutional aggravating circumstance. An aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer who must decide whether a particular murder merits life imprisonment or death for the defendant. Further, the Oklahoma courts have declined to reconsider that decision on appeal when the sentencer improperly included an invalid aggravating circumstance in the balancing process.⁴ In such a system, reliance upon an aggravating circumstance that is invalid under the federal constitution could affect the bal-

4. The Oklahoma Court of Criminal Appeals affirmed Cartwright's sentence on January 7, 1985. *Cartwright v. State*, 695 P.2d at 548. Later that year Oklahoma modified its capital punishment statute to allow for resentencing in the event that a death penalty is set aside on appeal. Okla.Stat. Ann. tit. 21, § 701.13(E)(2) (West Supp.1986). The Oklahoma court has held that this provision is not to be applied retroactively. *Green v. State*, 713 P.2d 1032, 1041 n. 4 (Okla.Crim.App. 1985), cert. denied, — U.S. —, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986). But see *Brewer v. State*, 718 P.2d 354, 365-66 (Okla. Crim.App.), (holding that a provision in the 1985 amendments eliminating mandatory proportionality review is to be applied retroactively), cert. denied, — U.S. —, 107 S.Ct. 245, 93 L.Ed.2d 169 (1986). Even if this provision were to be applied retroactively, the need for resentencing if an invalid aggravating circumstance was considered would put Oklahoma squarely in line with the Arkansas procedure described in *Collins*, 754 F.2d at 267, and would not eliminate the necessity of vacating a death sentence based in whole or in part upon consideration of an unconstitutional aggravating circumstance.

ance struck by the sentencer. The improper reliance is not corrected by the state appellate review process and is not a matter of state law beyond the review of a federal court in a habeas corpus proceeding. A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments. We therefore must consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was unconstitutionally vague.

II.

Death is qualitatively different from other punishments that can be imposed by the state. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 2603, 91 L.Ed.2d 335 (1986); *California v. Ramos*, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 3451-52, 77 L.Ed.2d 1171 (1983). This difference necessitates heightened scrutiny to assure that the capital sentencing decision does not violate the Eighth Amendment prohibition against cruel and unusual punishments. In a constitutional scheme borne of concern for restraining the effect of governmental action on personal life and liberty, the death sentence is the ultimate restraint. We are thus further charged with heightened responsibility for assuring that that restraint is exercised in strict conformity with the requirements of the Constitution. The Supreme Court has consistently demanded that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, — U.S. —, 107 S.Ct. 837,

839, 93 L.Ed.2d 934 (1987). The Constitution requires us to engraft objective standards on a sentencing decision so vulnerable to subjective judgments. The difficulty of the task is reflected in the words of Justice Harlan:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

McGautha v. California, 402 U.S. 183, 204, 91 S.Ct. 1454, 1466, 28 L.Ed.2d 711 (1971).

We must scrutinize the Oklahoma statutory scheme to determine whether the state has met the constitutional challenge of defining circumstances and terms that deter arbitrary and unpredictable sentencing decisions and provide adequate justification for imposing the death penalty. The question before this court is whether the application of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance satisfied the requirements of the Constitution in this case. We begin our consideration by examining the constitutional requirement that the discretion of a sentencer in a capital case be carefully guided.

A.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court effectively invalidated the capital punishment statutes of the thirty-nine states that provided absolute discretion to the sentencer in choosing the appropriate penalty in a capital case. The Court held that "the imposition and carrying out of the

death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40, 92 S.Ct. at 2727. Three justices concluded that a procedure for imposing the death penalty cannot allow complete and unguided discretion to the sentencer in deciding whether a particular defendant should be sentenced to death or life imprisonment. *Id.* at 255-57, 92 S.Ct. at 2734-35 (Douglas, J., concurring); *id.* at 309-10, 92 S.Ct. at 2762-63 (Stewart, J., concurring); *id.* at 314, 92 S.Ct. at 2764 (White, J., concurring). The existing procedures for the imposition of capital punishment provided "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313, 92 S.Ct. at 2764 (White, J., concurring).

Thirty-five states quickly enacted new statutes in an attempt to meet the constitutional demands. These statutes followed two different approaches. Some states sought to eliminate the arbitrary infliction of the death penalty by making the death penalty mandatory for all defendants convicted of first degree murder. Other states sought to channel the discretion of the sentencer by requiring separate guilt and sentencing proceedings, consideration of aggravating and mitigating circumstances, and appellate review of each death sentence.

The Supreme Court decided challenges to death sentences imposed under five of these statutes on July 2, 1976. The Court held that the death penalty is not cruel and unusual punishment *per se*. *Gregg v. Georgia*, 428 U.S. 153, 168-87, 96 S.Ct. 2909, 2922-31, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *id.* at 226, 96

S.Ct. at 2949 (White, J., concurring in the judgment) (citing *Roberts v. Louisiana*, 428 U.S. 325, 350-56, 96 S.Ct. 3001, 3013-16, 49 L.Ed.2d 974 (1976) (White, J., with Burger, C.J., Blackman and Rehnquist, JJ., dissenting)). The Court further found that the Georgia "guided discretion" statute satisfied the *Furman* mandate "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932 (opinion of Stewart, Powell, and Stevens, JJ.). The statute also "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." *Id.* at 206, 96 S.Ct. at 2940. See also *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (upholding the constitutionality of the Florida guided discretion statute); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (upholding the constitutionality of the Texas guided discretion statute). In contrast, the Court in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), and *Roberts v. Louisiana*, 428 U.S. at 325, 96 S.Ct. at 3002, held that the mandatory death penalty statutes of North Carolina and Louisiana were invalid because they failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," and "simply papered over the problem of unguided and unchecked jury discretion." *Woodson*, 428 U.S. at 302-03, 96 S.Ct. at 2990 (opinion of Stewart, Powell, and Stevens, JJ.).

As the Supreme Court recently explained:

[O]ur decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, *the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.* Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McCleskey v. Kemp, — U.S. —, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987) (emphasis added).

B.

An aggravating circumstance performs a crucial function in a capital punishment statute that endeavors to channel the discretion of the sentencer. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984). An aggravating circumstance is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the death penalty. In essence, an aggra-

vating circumstance is a legislative determination that "this murder is different." This difference "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742 (footnote omitted). A statutorily designated aggravating circumstance accomplishes this by "identify[ing] special indicia of blameworthiness or dangerousness in the killing." Weisberg, *Deregulating Death*, 1983 Sup.Ct.Rev. 305, 329 (1983). Thus, "the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." *Gregg*, 428 U.S. at 192, 96 S.Ct. at 2934 (opinion of Stewart, Powell, and Stevens, JJ.).

The narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination. Thus, aggravating circumstances must be described in terms that are commonly understood, interpreted and applied. To truly provide guidance to a sentencer who must distinguish between murders, an aggravating circumstance must direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. Many aggravating circumstances require distinctions among murders that are relatively easy for a sentencer to make: more than one person was killed by the acts of the defendant, Ky.Rev.Stat. § 532.025(2)(a)(6) (Michie/Bobbs-Merrill Supp. 1986); the victim was pregnant, Del. Code. Ann. tit. 11, § 4209(e)(1)(p) (Supp.1986); or the murder was committed by a hidden explosive device, Cal. Penal Code § 190.2(a)(4) (West Supp.1987).

The Supreme Court has warned, however, that a standard could be so vague that it would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742 (quoting *Gregg*, 428 U.S. at 195 n. 46, 96 S.Ct. at 2935 n. 46). Thus, if "an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibilities to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L.Rev. 941, 954 (1986) [hereinafter *The Standardless Standard*] (footnote omitted).

C.

The Oklahoma capital punishment statute includes as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, or cruel." Okl.Stat. Ann. tit. 21, § 701.12(4) (West 1983). Twenty-three other states have a similar aggravating circumstance, using such terms as "outrageously or wantonly vile," "heinous," "horrible," "brutal," "depraved," "cruel," "inhuman," and "atrocious" to describe a particularly offensive crime. See Rosen, *The Standardless Standard*, 64 N.C.L.Rev. at 943 n. 7. Although the Supreme Court has not held such language to be facially unconstitutional, the Court has "not stopped at the face of a statute, but [has] probed the application of statutes to particular cases." *McCleskey*,

107 S.Ct. at 1773. A state court interpretation of the statutory language of an aggravating circumstance can be "so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion." *Id.*

Cartwright alleges that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was applied in an unconstitutionally vague and overbroad manner in this case. In deciding this claim, we first review the Supreme Court decisions involving challenges to statutory provisions similar to the "especially heinous, atrocious, or cruel" aggravating circumstance at issue in this case. We then turn to the evolution of the meaning of "especially heinous, atrocious, or cruel" as construed by the Oklahoma Court of Criminal Appeals. Finally, we determine whether that court's application of the aggravating circumstance in this case satisfies the demands of the United States Constitution.

The Supreme Court first considered challenges to this type of aggravating circumstance in *Gregg* and *Proffitt*. Although the murder in *Gregg* had not been found to satisfy the aggravating circumstance that the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," see Ga.Code Ann. § 17-10-30 (b)(7) (1982), the petitioner asserted that the alleged vagueness of that provision rendered the entire Georgia statutory sentencing procedure unconstitutional. The Supreme Court disagreed, recognizing that it is "arguable that any murder involves depravity of mind or an aggravated battery," but concluding that "this language need

not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Gregg*, 428 U.S. at 201, 96 S.Ct. at 2938 (opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted). In *Proffitt*, the trial judge found that the murder was "especially heinous, atrocious, or cruel." See Fla.Stat. Ann. § 921.141(5)(h) (West 1985). The Florida courts had construed that provision to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The Supreme Court held that by so limiting the statutory description, the state provided adequate guidance to the sentencer. *Proffitt*, 428 U.S. at 255-56, 96 S.Ct. at 2968.

The Supreme Court reviewed the Georgia courts' application of the aggravating circumstance in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1739, 64 L.Ed.2d 398 (1980). Justice Stewart observed:

[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

Id. at 428, 100 S.Ct. at 1764 (plurality opinion of Stewart, J., with Blackmun, Powell, and Stevens, JJ.) (footnote and citations omitted). See also *id.* at 433, 100 S.Ct. at 1767 (Marshall, J., with Brennan, J., concurring in the judgment) (reiterating their belief that "the death pen-

alty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.") The jury had found only that the offense was "outrageously or wantonly vile, horrible and inhuman." *Id.* at 428, 100 S.Ct. at 1765 (footnote omitted). Because "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence . . . the jury's interpretation of [the aggravating circumstance] can only be the subject of sheer speculation." *Id.* at 428-29, 100 S.Ct. at 1765.

The plurality also found that the jury's uncontrolled discretion was not cured on appeal in the state courts. While in cases preceding *Godfrey* the Georgia Supreme Court had applied a narrowing construction of the statutory provision, in *Godfrey* the state court "simply asserted that the verdict was 'factually substantiated.'" *Id.* at 432, 100 S.Ct. at 1767. Therefore, the plurality considered "whether, in light of the facts and circumstances of the murders . . . the Georgia Supreme Court can be said to have applied a constitutional construction" of the statutory phrase. *Id.* The plurality concluded that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433, 100 S.Ct. at 1767. Accordingly, the Court reversed the sentence of death.

The Oklahoma Court of Criminal Appeals has reviewed almost thirty cases in which the death penalty was imposed after the jury concluded that a murder was "especially heinous, atrocious, or cruel." The court originally held that this aggravating circumstance must be applied according to the narrowing construction approved

in *Proffitt*, but Oklahoma has since abandoned that construction.

In *Eddings v. State*, 616 P.2d 1159 (Okla.Crim.App. 1980), *rev'd on other grounds sub nom. Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Oklahoma Court of Criminal Appeals considered the "especially heinous, atrocious, or cruel" provision for the first time. The court recognized that "[t]he aggravating circumstance in the statute is for murders that are *especially* heinous, atrocious and cruel, and obviously the Legislature must have intended to reach killings which are 'out of the ordinary.'" *Id.* at 1167 (emphasis original). The court then quoted the following passage from the narrowing construction of the Florida court that the Supreme Court had approved in *Proffitt*:

"[W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

Eddings, 616 P.2d at 1167-68 (quoting *Dixon*, 283 So.2d at 9). The court concluded that the killing of a police officer in the performance of his duties satisfied this stan-

dard,⁵ and that the testimony at trial regarding the defendant's manner indicated that the killing was "'designed to inflict a high degree of pain with utter indifference to . . . the suffering of others.'" *Eddings*, 616 P.2d at 1168 (quoting *Dixon*, 283 So.2d at 9).

Since *Eddings*, the Oklahoma court has consistently followed that part of the narrowing construction approved in *Proffitt* providing that "'heinous' means 'extremely wicked or shockingly evil'; 'atrocious' means 'outrageously wicked and vile'; and 'cruel' imports a design to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.'" *Brogie v. State*, 695 P.2d 538, 542 (Okla.Crim.App.1985) (quoting *Stafford v. State*, 665 P.2d 1205, 1217 (Okla.Crim.App. 1983), *vacated on other grounds*, 467 U.S. 1212, 104 S.Ct. 2651, 81 L.Ed.2d 359 (1984)). The court has frequently approved jury instructions using this language. *See, e.g., Davis v. State*, 665 P.2d 1186, 1202 (Okla.Crim.App.), *cert. denied*, 464 U.S. 865, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983); *Burrows v. State*, 640 P.2d 533, 542 (Okla.Crim.App.1982), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983); *Chaney v. State*, 612 P.2d 269, 280 (Okla.Crim.

5. The United States Supreme Court vacated the death sentence in *Eddings* because the state court had failed to consider evidence of the defendant's unhappy upbringing and emotional disturbance as a mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 113-17, 102 S.Ct. 869, 876-78, 71 L.Ed.2d 1 (1982). The Court also noted in dicta that the state court had held that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel." In response, the Court said, "we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey*." *Id.* at 109 n. 4, 102 S.Ct. at 874 n. 4.

App.1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 219 (1981).

The court has also quoted the passage in *Eddings*—originally approved in *Proffitt*—that limits this aggravating circumstance to “the conscienceless or pitiless crime which is unnecessarily torturous to the victim.” *Nuckolls v. State*, 690 P.2d 463, 471-73 (Okla.Crim.App.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Boutwell v. State*, 659 P.2d 322, 329 (Okla.Crim.App.1983); *Burrows*, 640 P.2d at 542.⁶ The Oklahoma Court of Criminal Appeals has never held that this language is mandatory, however, thus rejecting part of the narrowing construction approved in *Proffitt* and seemingly adopted in *Eddings*. In *Irvin v. State*, 617 P.2d 588, 598-99 (Okla.Crim.App.1980), the court held that it was not mandatory to include the “unnecessarily torturous to the victim” language in the instructions to the jury. Three years later, in *Davis*, 665 P.2d at 1202-03, the court rejected the argument that a substantial amount of torture

6. The uniform jury instruction which defines “heinous, atrocious, or cruel” provides:

As used in these instructions, the term “heinous” means extremely wicked or shockingly evil; “atrocious” means outrageously wicked and vile; “cruel” means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

The phrase “especially heinous, atrocious, or cruel” is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

Okla. Uniform Jury Instruction Cr. No. 436. This instruction has been used on occasion. See, e.g., *State v. Liles*, No. CRF-82-4268 (Okla. County Dist. Ct. May 18, 1983) (Instruction No. 3), *aff’d*, 702 P.2d 1025 (Okla.Crim.App.1985), *cert. denied*, — U.S. —, 106 S.Ct. 2291, 90 L.Ed.2d 732 (1986), *quoted in Supplement to Record*, Mar. 3, 1987, at 4.

must precede the killing for a murder to be “especially heinous, atrocious, and cruel.” Then, in *Nuckolls*, the court held:

[Our] cases make clear that suffering of the victim is not the major factor we consider regarding this aggravating circumstance. . . . [T]he “manner of the killing” is a relevant consideration, as well as the circumstances surrounding the homicide. We also have examined the killer’s attitude to learn if it was especially pitiless or cold.

690 P.2d at 472 (citations omitted). The court concluded that “both the circumstances leading up to, and the manner in which the homicide was committed, [are] sufficiently atrocious to be at the ‘core’ of the circumstance.” *Id.* at 472-73.

The Oklahoma Court of Criminal Appeals then decided Cartwright’s appeal in this case. The jury at Cartwright’s trial had been instructed that “the term ‘heinous’ means extremely wicked or shockingly evil; ‘atrocious’ means outrageously wicked and vile; ‘cruel’ means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.” On appeal the court noted that the statute is written in disjunctive language—the murder must be especially heinous, atrocious, or cruel—so a murder need only fall within one of these terms as defined by the court. *Cartwright v. State*, 695 P.2d at 554. The court then held that while torture is sufficient to satisfy this aggravating circumstance, it is not necessary. *Id.* The court described some of the factors that had supported this aggravating circumstance in previous cases: the defendant knew the victim and planned the murder well in advance, *Boutwell*,

659 P.2d at 329; the defendant shot his victims several times, *Davis*, 665 P.2d at 1202-03; the defendant shot three persons in a barroom for no apparent reason, *Jones v. State*, 648 P.2d 1251, 1259 (Okla.Crim.App.1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 799, 74 L.Ed.2d 1002 (1983); and the defendant kidnapped two women, demanded \$500,000 in ransom, and murdered and buried the women. *Chaney*, 612 P.2d at 280, 282. The court wrote:

Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder, that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; then he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. See as well our discussion in *Nuckols v. State*, 690 P.2d 463, 55 O.B.A.J. 2259 (Okla.Cr.1984), of the consideration to be given to the manner of a killing in determining whether a murder is heinous, atrocious or cruel.

Cartwright v. State, 695 P.2d at 554 (emphasis added).

The construction of "especially heinous, atrocious, or cruel" employed by the Oklahoma Court of Criminal Appeals in this case is a departure from the construction initially adopted in *Eddings*. The court no longer limits this aggravating circumstance to murders that are "unnecessarily torturous to the victim," one of the standards adopted in *Eddings* and previously approved by the Supreme Court in *Proffitt*. The court now relies upon the definitions of the terms "heinous," "atrocious," and "cruel," and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder. We must decide whether this construction serves to "channel the sentence's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey*, 446 U.S. at 428, 100 S.Ct. at 1764 (footnotes omitted).

Oklahoma has defined "heinous" as "extremely wicked or shockingly evil" and "atrocious" as "outrageously wicked and vile." These definitions fail for the same reason that the conclusory statement that the offense was "outrageously wicked and vile, horrible and inhuman" was inadequate in *Godfrey*: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428, 100 S.Ct. at 1765. A limiting construction of this aggravating circumstance is necessary precisely because adjectives such as "wicked" or "vile" can fairly be used to describe any murder.

These terms simply elude objective definition. A state does not channel the discretion of a sentencer or distinguish among murders when "heinous" and "atrocious" are defined only as "extremely wicked and shocking" and "outrageously wicked and vile." "Heinous" and "atrocious" have not been described in terms that are commonly understood, interpreted, and applied. Vague terms do not suddenly become clear when they are defined by reference to other vague terms.

The definition of "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others" is somewhat more precise, but there are two reasons why this definition does not now serve as an adequate standard. First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance. *See Nuckols*, 690 P.2d at 472; *see also Green v. State*, 713 P.2d 1032, 1044 (Okla.Crim.App.1985), *cert. denied*, — U.S. —, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986). Second, because the Oklahoma court has emphasized that a murder need only be especially heinous, atrocious, or cruel, *See Cartwright v. State*, 695 P.2d at 544, even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance. The court no longer limits the application of the "especially heinous, atrocious, or cruel" aggravating circumstance to those crimes that are "unnecessarily torturous to the victim." *See id.*

According to the state, the terms "heinous," "atrocious," and "cruel," coupled with their definitions, direct

the attention of the sentencer to the manner of the killing and the attitude of the killer. Transcript of oral argument at 19. The Oklahoma court has said that the attitude of the killer, the manner of the killing, the suffering of the victim, and all of the circumstances of the offense are relevant considerations in determining whether a murder was "especially heinous, atrocious, or cruel." *See Nichols*, 690 P.2d at 472; *see also Liles v. State*, 702 P.2d 1025, 1032 (Okla.Crim.App.1985), *cert. denied*, — U.S. —, 106 S.Ct. 2291, 90 L.Ed.2d 732 (1986). We examine each factor in turn.

In several cases the Oklahoma court has cited the killer's "conscienceless" or "pitiless" attitude or indifference to the suffering of the victim in supporting a finding that a murder was "especially heinous, atrocious or cruel." *See, e.g., Green*, 713 P.2d at 1044-45; *Cooks v. State*, 699 P.2d 653, 661 (Okla.Crim.App.), *cert. denied*, 474 U.S. 935, 106 S.Ct. 268, 88 L.Ed.2d 275 (1985); *Boutwell*, 659 P.2d at 329; *Jones*, 648 P.2d at 1259. But as the court has recognized, the attitude of the killer is best evidenced by what the killer has done. *See Green*, 713 P.2d at 1044-45. *See also Nuckols*, 690 P.2d at 473 ("the circumstances of this killing, coupled with appellant's comments . . . reveal this crime was shockingly pitiless"). Thus, the inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense.

"[T]he manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty." *Chaney*, 612 P.2d at 280. The unanswered question, however, is what manner of killing makes a murder

"especially heinous, atrocious, or cruel." The Oklahoma court has never explained why one manner of killing is "especially heinous, atrocious, or cruel" and why another manner of killing is not. The cases in which the court has found the manner of the killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed. *See, e.g., Green*, 713 P.2d at 1035 (defendant stabbed an inmate seventeen times in the chest and the back with a butcher knife and slashed in the throat); *Cooks*, 699 P.2d at 656 (defendant raped, beat, and suffocated an 87-year-old disabled woman); *Nuckols*, 690 P.2d at 465, 472-73 (defendant struck the victim with a ball peen hammer and kicked him repeatedly); *Jones*, 648 P.2d at 1253-54 (defendant repeatedly shot three persons in a bar). *But see Odum v. State*, 651 P.2d 703, 707 (Okla.Crim.App.1982) ("the manner of killing cannot be said to lie at the 'core' of the statutory aggravating circumstance" where the defendant shot the victim once in the neck and rendered him unconscious immediately). Further, the Oklahoma court has held a torture murder is not the only kind that is "especially heinous, atrocious, or cruel." *See Cartwright v. State*, 695 P.2d at 554. The court has not identified which manners of killing are *not* "especially heinous, atrocious, or cruel." Therefore, the court's reliance upon the manner of the killing does not serve to distinguish among those murders that are punishable by death and those that are not.

The suffering of the victim has been relied upon in several instances in which this aggravating circumstance was found. *See, e.g., Liles*, 702 P.2d at 1032; *Stafford*, 665

P.2d at 1217; *Burrows*, 640 P.2d at 543. On one occasion, the absence of any suffering by the victim led the state appeals court to reverse a finding that a murder was "especially heinous, atrocious, or cruel." *Odum*, 651 P.2d at 707. Nonetheless, the court has held that it is not necessary for the victim to have suffered for a murder to satisfy this aggravating circumstance. *See Nuckols*, 690 P.2d at 472. Suffering is sufficient but not required.

The Oklahoma Court of Criminal Appeals, then, has said that the attitude of the killer, the manner of the killing, or the suffering of the victim *can* support this aggravating circumstance, but the court has refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance. The underlying position of the Oklahoma court appears to be that it can simply review the circumstances of the murder and divine whether the murder was "especially heinous, atrocious, or cruel." *See Cartwright v. State*, 695 P.2d at 554; *see also Nuckols*, 690 P.2d at 472, *quoted in Green*, 713 P.2d at 1044. In numerous cases the court has affirmed a finding that a murder was "especially heinous, atrocious, or cruel" with no more than a statement that "the facts adequately support" the aggravating circumstance. *Ake v. State*, 663 P.2d 1, 11 (Okla.Crim.App.1983), *rev'd on other grounds*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *See also, e.g., Coleman v. State*, 668 P.2d 1126, 1138 (Okla.Crim.App. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 986, 79 L.Ed.2d 222 (1984); *Hays v. State*, 617 P.2d 223, 231-32 (Okla. Crim.App.1980).

We agree that all of the circumstances surrounding a murder must be examined to determine whether the mur-

der was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheer speculation." *Godfrey*, 428 U.S. at 429, 100 S.Ct. at 1765. Indeed, courts that have considered similar aggravating circumstances have held:

[A murder] can be especially heinous because the victim is too young, too old, or because the defendant chose his victims so that they were not too young or too old. If the defendant killed for no reason, the murder is especially heinous, as is a murder committed for a reason the appellate court does not like. A killing is especially heinous if the victim is aware of the impending death, and also if the killing is done without warning.

Rosen, *The Standardless Standard*, 64 N.C.L.Rev. at 989 (footnotes omitted). The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*. No objective standards limit that discretion.

In this case the court described the events surrounding the murder including the petitioner's motive for the murder, the preparation for the attack, the attack itself, and the petitioner's efforts to conceal his activities. The court then held that these events "adequately supported the jury's finding." *Cartwright v. State*, 695 P.2d at 554.

This conclusion is no different than the finding that the verdict was "factually substantiated" that was held inadequate in *Godfrey*. 446 U.S. at 419, 100 S.Ct. at 1760. We therefore hold that the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of "especially heinous, atrocious, or cruel" in this case.

III.

The question remains whether this court can *sua sponte* adopt a constitutionally permissible narrowing construction of "especially heinous, atrocious, or cruel" and apply that construction to the facts of this case.

In *Godfrey*, the plurality characterized the failure of the state court to apply a proper narrowing construction as an aberrational lapse. 446 U.S. at 430-32, 100 S.Ct. at 1765-66. *But see id.* at 435-36, 100 S.Ct. at 1768-69 (Marshall, J., concurring in the judgment) (arguing that the Georgia court had either abandoned or consistently broadened its previous narrowing construction of the statutory provision). The plurality then applied the narrowing construction usually employed by the Georgia court to the facts of the murders in that case. The Oklahoma court, on the other hand, has now explicitly denied the necessity of finding that a murder was "unnecessarily torturous to the victim." Compare *Cartwright v. State*, 695 P.2d at 554 (torture is sufficient but not necessary) with *Eddings*, 616 P.2d at 1168. ("What is intended [is] the conscienceless or pitiless crime which is unnecessarily torturous to the victim." (The Oklahoma court has also rejected the argument that the suffering of the victim is the primary factor to be considered in deciding whether this aggravat-

ing circumstance can be applied to a particular murder. See *Nuckols*, 690 P.2d at 472; *Green*, 713 P.2d at 1044. The remaining "standards" advanced by the Oklahoma court are unconstitutionally vague. Therefore, unlike the Court in *Godfrey*, there is no constitutionally adequate narrowing construction adopted by the state courts that we can apply to the instant case.

We do not decide what narrowing construction of the "especially heinous, atrocious, or cruel" aggravating circumstance would satisfy the constitutional requirements. That determination must be made by the state in the first instance as it construes its own laws in light of constitutional requirements. The Supreme Court has pointedly declined the opportunity "to dictate to the State the particular *substantive* factors that should be deemed relevant to the capital sentencing decision." *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3452 (emphasis original). The *Ramos* Court concluded:

It would be erroneous to suggest, however, that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate. In *Gregg* itself the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in *Furman*. . . .

Beyond these limitations, as noted above, the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.

Id. at 1000-01, 103 S.Ct. at 3452-53.

We have held that the construction of the "especially heinous, atrocious, or cruel" aggravating circumstance ap-

plied by the Oklahoma Court of Criminal Appeals in this case is unconstitutionally vague. We will not presume to specify "the factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decision.*" *Id.* at 1000, 103 S.Ct. 3452 (emphasis original) (quoting *Gregg*, 428 U.S. at 192, 96 S.Ct. at 2934).

IV.

We make no judgment as to whether the attack in this case was "especially heinous, atrocious, or cruel." We hold only that the Oklahoma courts failed to guide the sentencer's discretion with constitutionally adequate standards.

The order of the District Court for the Eastern District of Oklahoma is affirmed with respect to the denial of the writ but reversed with respect to its denial of all further relief. The case is remanded to the district court with directions to enter judgment that the writ of habeas corpus is denied but, as the law and justice require,⁷ the death sentence of petitioner is invalid under the Eighth and Fourteenth Amendments to the United States Constitution. The execution of the petitioner under this invalid death sentence is enjoined. This judgment is without pre-

7. The federal habeas statute empowers the federal courts to make disposition of the matter "as law and justice require." 28 U.S.C. § 2243; *Carafas v. LaVallee*, 391 U.S. 234, 239, 88 S.Ct. 1556, 1560, 20 L.Ed.2d 554 (1968); *Chaney v. Brown*, 730 F.2d 1334, 1358 (10th Cir.), cert. denied, 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984).

judice to further proceedings by the state for redetermination of the sentence on the conviction.⁸

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

8. We express no opinion concerning the constitutionality of a retroactive application of Oklahoma's new remand procedure. See *Dutton v. Brown*, 812 F.2d 593, 602 n. 10 (10th Cir.1987) (en banc), *petition for cert. filed*, 55 U.S.L.W. 3747 (U.S. May 5, 1987).

No. 87-519

Supreme Court, U.S.

FILED

FEB 25 1988

JOSEPH R. SPANOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals has been interpreting the aggravating circumstance "especially heinous, atrocious, or cruel" in an unconstitutional manner when that court relies upon the attitude of the murderer, the manner of the killing, and the suffering of the victim in reviewing death sentences in which that aggravating circumstance has been found.

2. Whether the finding by the jury of a second aggravating circumstance, that the defendant knowingly created a great risk of death to more than one person, in addition to the finding that the murder was "especially heinous, atrocious, or cruel," sufficiently

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narrowed the class of persons subject
to the death sentence.

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No. 87-519

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

BRIEF OF PETITIONERS

OPINIONS BELOW

The decision of the United States Court of Appeals from which certiorari has been granted is reported as Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc) (J.A. 35). This decision vacated the opinion of the original three judge panel, which

had affirmed the denial of Cartwright's (hereinafter referred to as "the Defendant") petition for a writ of habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

The en banc opinion reversed the order and judgment of the United States District Court for the Eastern District of Oklahoma, Cartwright v. Maynard, No. 86-54-C (E.D. Okla. Feb. 11, 1986).

The opinion of the case on direct appeal is reported as Cartwright v. State, 695 P.2d 548 (Okla. Crim. App. 1985), cert. denied, 473 U.S. 911 (1985) (J.A. 20).

The opinion of the Oklahoma Court of Criminal Appeals in the post-conviction appeal of this case is reported as Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985), cert.

denied, 474 U.S. 1073 (1986), which affirmed the findings of fact and conclusions of law of the District Court of Muskogee County in State v. Cartwright, No. PC-84-665 (Okla. Crim. App. 1985).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

Okla. Stat. tit. 21, § 701.7 (1981)¹

stated:

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Okla. Stat. tit. 21, § 701.9 (1981)

states:

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by

¹ This section was amended in 1982 adding a paragraph that related to the death of a child.

death or by imprisonment for life.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

Okla. Stat. tit. 21, § 701.10 (1981)

states:

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation

as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Okla. Stat. tit. 21, § 701.11 (1981)

states:

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the

finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Okla. Stat. tit. 21, § 701.12 (1981)

states:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence

of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed in performance of official duty.

Okla. Stat. tit. 21, § 701.13 (1981)

(since amended) stated:

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and

address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to

present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or
2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

STATEMENT OF THE CASE

William Thomas Cartwright (hereinafter referred to as "the Defendant"), was convicted in the District Court of Muskogee County for

the crimes of murder in the first degree and shooting with intent to kill after a trial by jury, and was given the death sentence by the same jury for the murder conviction. The trial and sentencing took place on October 18-21, 1982.

At trial, evidence was presented showing that on the evening of May 4, 1982, Charma Riddle and her husband Hugh, returned to their residence after spending the previous night at the home of her parents (Tr. 383, 385-86). The Riddles were co-owners of a remodeling business (Tr. 383).

After eating dinner, Mr. and Mrs. Riddle were sitting in the living room watching television. Mrs. Riddle got up to use the bathroom. As she started down the hallway leading to the

bathroom, she was suddenly confronted by the Defendant, a former employee, who apparently had surreptitiously entered the Riddle's house. The Defendant leveled a shotgun at Mrs. Riddle's stomach (Tr. 391). When Mrs. Riddle grabbed the barrel of the shotgun in self-defense, the Defendant shot her in the leg. When she fell to the floor, the Defendant shot her in the other leg, and then proceeded to the living room. There he shot and killed Hugh Riddle with one blast from the shotgun (Tr. 391-92).

Mrs. Riddle was able to crawl to the bedroom, and there she attempted to use the telephone to call for help. After the Defendant shot Mr. Riddle, he came into the bedroom where Mrs. Riddle was, and advised her that he had

murdered Mr. Riddle because they had fired him. The Defendant then slit Mrs. Riddle's throat, and stabbed her in the abdomen (Tr. 394).

Mrs. Riddle lost a leg because of the attack, but incredibly, she survived,² and identified the Defendant at trial (Tr. 396-97).

Other evidence at trial revealed that the Defendant told friends and co-workers that he was upset with the Riddles because they had not wanted to pay the doctor bills for injuries sustained by the Defendant while he was employed by them. The Defendant also stated that he was going to "get even"

² The doctor who examined Mrs. Riddle when she arrived at the emergency room testified that she had lost so much blood because of the attack that she had no blood pressure and "was literally at death's door." (Tr. 303).

if he did not get any money (Tr. 101-02; 124-25).

The Defendant admitted going to the Riddles' house and having a conversation with Mr. Riddle, but claimed that he was hit on the head as he turned and walked away from him (Tr. 478-88).

The Defendant also produced a number of witnesses who testified that he was a good employee, was not a violent person, and did not get upset (Tr. 444, 446-47, 451-52, 454-55, 459-63, 467).

The jury returned a verdict of guilty for the crime of murder in the first degree in Count I of the information, and shooting with intent to kill in Count II (Tr. 606). The jury sentenced the Defendant to

seventy-five years in prison for the shooting with intent to kill conviction (Tr. 606).

In the second stage of the trial, both sides relied on virtually the same evidence as was introduced in the first stage (Tr. 611-17). The jury returned a sentence of death, finding the existence of two aggravating circumstances: (1) that the Defendant knowingly created a great risk of death to more than one person; and (2) that the murder was especially heinous, atrocious, or cruel (Tr. 637); (J.A. 18).

On direct appeal to the Court of Criminal Appeals, the court upheld the finding of both aggravating circumstances. Cartwright v. State, 695 P.2d 548, 554-55 (Okla. Crim. App. 1985);

(J.A. 20). The court held that the aggravating circumstance "especially heinous, atrocious, or cruel" was supported by the evidence for the following reasons:

Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to

kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only the arrival of the police officers, adequately supported by the jury's finding. See as well our discussion in Nuckols v. State, 690 P.2d 463, 55 O.B.A.J. 2259 (Okla. Cr. 1984), of the consideration to be given to the manner of a killing in determining whether the murder is heinous, atrocious or cruel.

Id. at 554; (J.A. 30).

The court also held that the evidence was sufficient to support the other aggravating circumstance, that the Defendant's acts created a great risk of death to more than one person. Cartwright v. State, 695 P.2d at 555; (J.A. 31).

The court also conducted a

proportionality review in accordance with Okla. Stat. tit. 21 § 701.13 (1981) (since amended).

After the Defendant pursued his remedies through the state court system, he filed a petition for a writ of habeas corpus which was denied by the United States District Court for the Eastern District of Oklahoma.

The Defendant then appealed the denial of his petition for writ of habeas corpus to the United States Court of Appeals for the Tenth Circuit. The original three judge panel affirmed the denial of the Defendant's Petition for Writ of Habeas corpus. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986). However, the Circuit granted a rehearing en banc, and subsequently the entire panel issued an opinion in which

it reversed the denial of the Defendant's petition as to the sentencing stage of the Defendant's trial. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987); (J.A. 35).

The en banc panel held that the Oklahoma Court of Criminal Appeals had failed to apply a proper narrowing construction to the aggravating circumstance "especially heinous, atrocious, or cruel." The court stated that the state appellate court's construction of this aggravating circumstance did not genuinely narrow the class of murders to which the death penalty was to be applied, in violation of Zant v. Stephens, 462 U.S. 862 (1983), and Godfrey v. Georgia, 446 U.S. 420 (1980). 822 F.2d at 1491.

The court also held that since capital sentencing juries in Oklahoma weighed aggravating and mitigating circumstances, and since the Court of Criminal Appeals did not conduct an independent reweighing on appeal when an invalid aggravating circumstance had been found, the holding in Barclay v. Florida, 463 U.S. 939 (1983) was not applicable. The court in Cartwright stated that the overbroad construction of the aggravating circumstance "especially heinous, atrocious, or cruel" required that the death sentence be invalidated, despite the fact that the jury found the existence of another aggravating circumstance, that the Defendant knowingly created a great risk of death to more than one person. Cartwright v. Maynard, 822

F.2d at 1481-83. The court held that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments." Id. at 1483.³

³ In response to the present case, the Oklahoma Court of Criminal Appeals, in Stouffer v. State, 742 P.2d 562 (Okla. Crim. App. 1987) (on rehearing), made two revisions in its review of capital cases. The aggravating circumstance "especially heinous, atrocious, or cruel" is now limited to instances where the death of the victim was preceded by torture or serious physical abuse, and the Court of Criminal Appeals now will reweigh aggravating and mitigating circumstances if an aggravating circumstance is not supported by the evidence. Id. at 563-65. However, a number of pending Oklahoma capital cases are threatened by the Tenth Circuit's ruling. See, e.g., Coleman v. Brown, 802 F.2d 1227, 1235 (10th Cir. 1986); Stafford v. State, 665 P.2d 1205, 1217 (Okla. Crim. App. 1983), vacated 467 U.S. 1212 (1984), aff'd., 700 P.2d 223 (Okla. Crim. App. 1985). The Coleman (continued...)

SUMMARY OF ARGUMENT

I.

The United States Court of Appeals for the Tenth Circuit invalidated the death sentence in this case because it believed that the Oklahoma Court of Criminal Appeals was not applying a proper narrowing construction to the aggravating circumstance "especially heinous, atrocious, or cruel." Oklahoma contends that it is appropriate for a state appellate court to consider the manner of killing, the attitude of the killer, and the suffering of the victim when construing this aggravating circumstance. In the

³(...continued)

case was argued in the Tenth Circuit in its second federal habeas corpus appeal on October 2, 1987, primarily regarding the issue of the effect of the present case on it. See Coleman v. Saffle, No. 87-2011.

present case the evidence demonstrated that the Defendant surreptitiously entered the home of Hugh and Charma Riddle, shot Mrs. Riddle in the leg, left her to murder her husband with a shotgun, then returned to cut her throat and stab her in the abdomen. Oklahoma contends that this evidence sufficiently supports the state court's finding that the murder was "especially heinous, atrocious, or cruel."

This Court should not require that the aggravating circumstance "especially heinous, atrocious, or cruel" be limited to situations involving serious physical abuse. The wording of the phrase itself, which was upheld by this Court in Proffitt v. Florida, 428 U.S. 242, 255 (1976), makes it appropriate for the sentencer

to consider the manner of the killing, and the attitude of the killer, as well as the suffering inflicted upon the victim. Other state appellate courts have held that it is appropriate to consider those factors in reviewing the sufficiency of the evidence supporting such. Because the states are not restricted as to what aggravating circumstances they can select, and since aggravating circumstances throughout the country vary with regard to all aspects of a murder case, Oklahoma could appropriately consider the facts that it did when reviewing the Defendant's death sentence.

Furthermore, the requirement that a victim suffer physical pain before this aggravating circumstance could be found would mean that an artificial and

arbitrary line has been drawn between different types of murders. For example, someone who is killed with a knife is likely to suffer more physical pain than a victim of a gunshot wound. Additionally, since some states have held that the aggravating circumstance in question can be met if the victim underwent psychological torture, the only difference between that interpretation and Oklahoma's (and other states that construe "especially heinous atrocious, or cruel" similarly), is whether the victim was aware that he or she was about to be murdered. States should be free to have the aggravating circumstance "especially heinous, atrocious, or cruel" include consideration of the

attitude of the killer, and the manner in which the killing was performed.

It is Oklahoma's view that it is an impossible task for a state appellate court to make distinctions between different kind of murders, and that as long as the aggravating circumstance in question has generally narrowed the class of persons to which the death penalty is subject, and if the evidence is sufficient to support that aggravating circumstance, the inquiry by the federal court should end.

II.

It should not be unconstitutional for a state to have a aggravating circumstance that allows the sentencer to use subjective considerations. In Barefoot v. Estelle, 463 U.S. 880, 896-99 (1983); California v. Ramos, 463

U.S. 992, 1001-06 (1983); and Jurek v. Texas, 428 U.S. 262, 274-76 (1976), this Court held that future conduct is a proper consideration in the decision whether to impose the death penalty. Since that aggravating circumstance is more vague than the "especially heinous, atrocious, or cruel" aggravating circumstance, and requires the sentencer to speculate as to the future conduct of the murderer, the United States Court of Appeals for the Tenth Circuit in this case, and the Ninth Circuit in the case of Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), were wrong when they held that the aggravating circumstance "especially heinous atrocious, or cruel" cannot have a subjective aspect.

The aggravating circumstance in question should not be used as a vehicle to give federal courts supervisory review over state courts to determine whether they are appropriately evaluating the death penalties imposed in their jurisdictions. The holding by this Court in Pulley v. Harris, 465 U.S. 37 (1984), which held that states are not required to conduct a proportionality review of death sentences, supports Oklahoma's position.

Further evidence of the unworkability of the requirement that state appellate courts attempt to insure that different juries in different cases are imposing death sentences in a principled manner is the fact that

prosecutors have total discretion as to what charges are to be filed.

Also, because this Court has previously held that nonstatutory aggravating circumstances can be considered by the sentencer, requiring that all statutory aggravating circumstances be objective has no purpose.

Finally, it is futile to require states to interpret "especially heinous, atrocious, or cruel" in a objective manner because this Court has repeatedly held that a sentencer must consider any relevant mitigating evidence relating to a defendant's character or background. This decision is completely subjective because the jury has complete and unguided discretion with regard as to what they

consider mitigating, and whether the mitigating factors outweigh the aggravating circumstances.

III.

Because the jury in the present case also found the existence of a second aggravating circumstance, that the acts of the Defendant "knowingly created a great risk of death to more than one person," Oklahoma has genuinely narrowed the class of persons subject to the death penalty. Therefore, this case is identical, both factually and legally, to Lowenfield v. Phelps, 108 S.Ct. 546 (1988), where the death penalty was upheld in a case where the jury found only one aggravating circumstance, which also was that the defendant "knowingly

created a great risk of death or bodily harm to more than one person."

The Tenth Circuit also invalidated the death sentence in the present case because under Oklahoma's capital punishment scheme, the jury balances aggravating versus mitigating circumstances, and since the Tenth Circuit found that the aggravating circumstance "especially heinous, atrocious, or cruel" was "invalid," the death penalty would have to be set aside. Oklahoma's capital sentencing statute, however, is essentially the same as Louisiana's, in that both require the jury to either "weigh" aggravating against mitigating circumstances, or to "consider" mitigating circumstances. The difference between whether the jury "weighed" or "considered" aggravating

and mitigating circumstances is a matter of semantics.

Furthermore, the Oklahoma Court of Criminal Appeals never held that the aggravating circumstance "especially heinous, atrocious, or cruel" was invalid, or that the evidence was insufficient to support such. Finally, all evidence that was admissible to prove "especially heinous, atrocious, or cruel" was admissible to support the aggravating circumstance "knowingly creat[ing] a great risk of death to more than one person."

ARGUMENTPROPOSITION I.

SINCE THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FINDING BY THE JURY AND THE OKLAHOMA COURT OF CRIMINAL APPEALS THAT THE SHOTGUN MURDER OF THE VICTIM WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL," THE DEATH SENTENCE SHOULD NOT BE SET ASIDE ON THE PURPORTED GROUND THAT THE SENTENCER'S DISCRETION WAS NOT ADEQUATELY CHanneled BY THIS SENTENCING GUIDELINE.

This case involves the application of the aggravating circumstance "especially heinous, atrocious, or cruel," review of which will necessarily implicate similar aggravating circumstances, such as those which require that the murder be "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of

mind. . . ." See, e.g., Ga. Stat. Ann.
§ 17-10-30 (1982).⁴

Although this aggravating circumstance has been criticized as being vague, see Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L. Rev. 941 (1986) [hereinafter Especially Heinous], it was upheld by this Court in Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). This holding by the Court has been relied upon by the states for eleven

⁴ Throughout this brief these similar aggravating circumstances will be referred to as "especially heinous, atrocious, or cruel" or its equivalent. Twenty-four states have "especially heinous, atrocious, or cruel" or its equivalent as an aggravating circumstance. See Appendix "A;" Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L. Rev. 941, 943 (1986).

years. In Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir. 1985), cert. denied, 474 U.S. 975 (1986), the Eleventh Circuit noted:

[The petitioner's] charge that the phrase "especially heinous, atrocious or cruel" is unconstitutionally vague has been decisively repudiated by the United States Supreme Court. Proffitt v. Florida, 428 U.S. 242, 255-56, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924-25 (1976).

See also Williams v. Maggio, 679 F.2d 381, 388-90 (5th Cir. 1982) (court notes that in Gregg v. Georgia, 428 U.S. 153 (1976), the Georgia aggravating circumstance was not held to be unconstitutional on its face).

The jury in the present case was given the following definition of "especially heinous, atrocious, or cruel" (Instruction No. 16):

As used in these Instructions, the term "heinous" means

extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

(J.A. 12). The instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), a case referred to in Proffitt v. Florida, 428 U.S. 242, 255 (1976).

The Tenth Circuit observed that the Oklahoma Court of Criminal Appeals, in reviewing cases in which that aggravating circumstance had been found, has held that either the attitude of the killer, the manner of the killing, or the suffering of the victim can be used to uphold a jury finding that this aggravating circumstance existed. The Tenth Circuit held, therefore, that the Oklahoma court had not interpreted this

aggravating circumstance in a way that genuinely narrowed the class of persons subject to the death sentence.

Cartwright v. Maynard, 822 F.2d at 1488-91.

- A. THE DEFINITION OF "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" SHOULD NOT BE LIMITED TO THOSE SITUATIONS WHERE THE VICTIM HAS SUFFERED PHYSICAL OR MENTAL TORTURE; THE WORDING OF THE PHRASE ITSELF MAKES IT APPROPRIATE FOR THE SENTENCER TO CONSIDER THE MANNER OF THE KILLING AND THE ATTITUDE OF THE KILLER.

The opinion of the Tenth Circuit in Cartwright can be read to imply that the aggravating circumstance "especially heinous, atrocious, or cruel" must be limited to those cases where the victim has suffered from physical abuse, and factors such as the attitude of the killer cannot be considered in determining whether the

murder in question fits the definition. See Cartwright, 822 F.2d at 1488-90. The court also criticized the Oklahoma court for allowing reliance on all of the circumstances of the crime in determining whether the murder was "especially heinous, atrocious, or cruel." Id. at 1490 ("inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense"), and at 1491 ("Consideration of all of the circumstances is permissible; reliance upon all of the circumstances is not.").

If there is a constitutional distinction between "consideration" and "reliance" in this context, it is one that is not understood by the State.

While it has been suggested that the Court in Godfrey v. Georgia, 446 U.S. 420 (1980) made evidence of serious physical abuse a constitutional element of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, deprivation of mind. . . ." (and necessarily, its equivalent, "especially heinous, atrocious, or cruel"), see Godfrey, 442 U.S. at 443 (Burger, C.J., dissenting), Oklahoma contends that "especially heinous, atrocious, or cruel" or its equivalent has not been given such a restrictive definition by the courts interpreting such, and should not be so limited by this Court.

In Turner v. Bass, 753 F.2d 342, 352 (4th Cir. 1985), rev'd on other grounds sub. nom. Turner v. Murray, 474

U.S. 28 (1986), the Fourth Circuit upheld the death sentence in a case where the defendant (who was convicted of shooting a store owner with a handgun), and rejected his challenge to the aggravating circumstance in question, that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. While noting that the Supreme Court of Virginia, applying Godfrey v. Georgia, 446 U.S. 420 (1980), had adopted a requirement that the murder involve either torture or "aggravated battery," the Fourth Circuit stated that the murder in Turner "was cold-blooded and calculated, involving no emotional trauma as was present in Godfrey." In

other words, the court reviewed the attitude of the killer in determining whether the evidence supported the aggravating circumstance, which was similar to the review conducted by the Oklahoma Court of Criminal Appeals in the present case.

The State in the present case also points out that the requirement of an "aggravated battery" mentioned in Turner does not necessarily make the aggravating circumstance less vague. Any murder committed with a knife or a firearm arguably involves "aggravated battery" to the victim. Certainly it could be argued that the victim in the present case, Hugh Riddle, was a victim of an "aggravated battery" since he was shot with a shotgun.

Nor is there any meaningful difference between the death of Hugh Riddle and the victim in Turner v. Bass, 753 F.2d at 344, 352-53. The defendant in Turner shot the victim in the head with a handgun, and then shot him again twice as he lay "still living, helpless and 'gurgling.'" Presumably he was unconscious, since the opinion states that only a witness pleaded with the petitioner not to shoot anyone else, and the opinion of the Supreme Court of Virginia in that case notes that the store owner was shot in the temple. Turner v. Commonwealth, 273 S.E.2d 36, 39 (Va. 1980). Since the victim was rendered unconscious by the first gunshot, it is obvious that he was not a victim of torture.

In Jeffers v. Ricketts, 832 F.2d 476, 482-86 (9th Cir. 1987), the Ninth Circuit observed that the Arizona Supreme Court adopted the dictionary definitions of the aggravating circumstance "especially heinous, cruel, or depraved manner," and that the terms that defined such "go to the mental state and attitude of the perpetrator as reflected in his words and actions." Id. at 483. The Arizona Supreme Court had in previous cases set forth five factors that lead to a finding of heinousness or depravity: (1) a relishing of the murder by the killer; (2) gratuitous violence against the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; and (5) helplessness of the victim. The Ninth Circuit held that

since the standard of heinousness and depravity could not be applied in a principled manner to the defendant in that case, the death sentence must be stricken as being arbitrary. Id. at 485.

Another panel of the Ninth Circuit, however, has upheld the Arizona Supreme Court's application of the same aggravating circumstance. Woratzeck v. Ricketts, 820 F.2d 1450, 1458 (9th Cir. 1987).

In Especially Heinous 64 N.C.L. Rev. at 972-88, the author sets forth cases in the states of Florida, North Carolina, Tennessee, Nebraska, Alabama, Arizona, Georgia, Mississippi, Missouri, Oklahoma and Virginia, where state appellate courts have interpreted "especially heinous, atrocious and

cruel" or its equivalent to encompass factors such as the murder's attitude, and the manner of killing. A number of those cases involve situations where the victim has died instantly, and without apparent physical or mental suffering.

Other cases have upheld the aggravating circumstance "especially heinous, atrocious, or cruel" or its equivalent when the victim suffered psychological torture. See Lindsey v. Smith, 820 F.2d 1137, 1153 (11th Cir. 1987) (victim who was bound and gagged suffered psychological torture before her murder); and Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1987) (victims were executed by being shot one by one in the head in the presence of the

others). See also White v. Wainwright, 809 F.2d 1478, 1485 (11th Cir. 1987) (the aggravating circumstance "especially heinous, atrocious, or cruel" was properly applied to a participant in the Francois murders who was opposed to the executions).

Significantly, the amended bill of particulars in the present case, in specifying what was meant by "especially heinous, atrocious, or cruel," states that the shotgun slaying inflicted great pain and suffering on the victim, Hugh Riddle (J.A. 6). Also, the Oklahoma Court of Criminal Appeals found that "Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror

as he was confronted by the appellant and realized his impending doom." Cartwright, 695 P.2d at 554.

In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir. 1987), cert. denied, 108 S.Ct. 6 (1987), the Fifth Circuit upheld the finding by the federal district court that the aggravating circumstance "especially heinous, atrocious, or cruel" was properly submitted to the jury without a limiting instruction and without sufficient evidence. See also Evans v. Thigpen, 631 F. Supp. 274, 284-85 (S.D. Miss. 1986) (district court's opinion in the same case). The facts in Evans reveal that the victim was shot in the head as he knelt motionless behind a store owner during a robbery. Id. at 284; Evans v. State, 422 So.2d 737, 739

(Miss. 1982). The federal district court, using reasoning that was later adopted by the Fifth Circuit, 809 F.2d at 241, stated:

In such circumstances, the mental anguish and psychological torture suffered by the victim prior to the infliction of the death-producing wound may be considered with respect to the "heinous, atrocious or cruel" factor and make its application constitutionally unobjectionable. Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1984).

631 F. Supp. at 285.

Certainly the victim in the present case, Mr. Riddle, suffered the same mental anguish as did the victim in Thigpen when the Defendant Cartwright burst into Mr. Riddle's living room and murdered him with a shotgun after having shot Mr. Riddle's wife when she was in the hallway.

Furthermore, making physical suffering a constitutionally required element of "especially heinous, atrocious, or cruel" would mean that there has been a narrowing of the class of persons eligible for the death sentence strictly for its own sake. There is no reason to prohibit a state from imposing the death sentence upon a defendant who has killed in a manner that causes the victim to die immediately. The requirement that a victim suffer physical pain before this aggravating circumstance has been met would mean that in many cases if the killer is a poor marksman whose gunshot did not cause immediate death, he or she would be a candidate for the death sentence, while a good marksman would

escape the death sentence because his or her victim was killed immediately.

This distinction could also mean that someone who killed by stabbing with a knife, see, e.g., Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir. 1985), cert. denied, 474 U.S. 975 (1986); and Palmer v. Wainwright, 725 F.2d 1511, 1523-24 (11th Cir. 1984), cert. denied, 469 U.S. 873 (1984), would be a candidate for the death sentence, while those who used firearms would not. Those killers who use firearms should not receive the special protection this distinction would breed.⁵

⁵ All four Presidents of the United States who have been assassinated have died as a result of gunshot wounds (Lincoln, Garfield, McKinley, and Kennedy).

The definition "especially heinous, atrocious, or cruel" itself implies that the manner of killing and the attitude of the killer should be aspects of this aggravating circumstance.⁶ Furthermore, in the present case the Oklahoma Court of Criminal Appeals engaged in a lengthy discussion of why this murder was "especially heinous, atrocious, or cruel." Cartwright v. State, 695 P.2d at 554. This is the process that other state appellate courts have used in

⁶ In his plurality opinion in Gregg v. Georgia, 428 U.S. 153, 185-86 (1976), Justice Stewart observed that the state of mind of the killer is a proper subject for capital punishment, noting that the deterrent aspect of the death sentence may be directed toward "carefully contemplated murders, . . . where the possible penalty of death may well enter into the cold calculus that precedes the decision to act [footnote omitted].

interpreting "especially heinous, atrocious, or cruel" or its equivalent. See Especially Heinous, 64 N.C.L. Rev. at 972-88. To require that "especially heinous, atrocious, or cruel" be limited only to those cases involving torture or physical abuse to the victim before death would be to restrict the types of crimes that qualify as such for no other reason than that this is a short and pithy definition of "especially heinous, atrocious, or cruel." However, if a state appellate court believes that longer and more detailed analysis of what acts constitute "especially heinous, atrocious, or cruel" or its equivalent is required, they should be granted that deference. It seems logical to consider the attitude of the

murderer and the manner of the killing in determining whether a particular murder is more heinous than others.

In the present case, the Oklahoma Court of Criminal Appeals gave a comprehensive explanation as to why it believed that the murder was "especially heinous, atrocious, or cruel," a task that necessarily involved review of the circumstances of the murder and the Defendant's motives, attitude, and efforts to conceal the crimes. Cf. Odum v. State, 651 P.2d 703, 707 (Okla. Crim. App. 1982) (evidence was not sufficient to support the jury finding of "especially heinous, atrocious, or cruel" where prior to murder there had been an altercation in a bar between the defendant and the victim, and there was

no evidence of physical or mental suffering). In Godfrey this Court involved itself in a discussion of the mental state of the killer, the circumstances surrounding the crime, and the fact that he acknowledged responsibility for the crimes. 446 U.S. at 433.

Oklahoma contends that the standard of review regarding the sufficiency of evidence supporting aggravating circumstances should be the same as that involving federal review of the sufficiency of evidence in other state criminal cases. See Jackson v. Virginia, 443 U.S. 307 (1979). The standard should be whether any rational factfinder could have found the existence of the aggravating circumstance. See Godfrey v. Georgia,

446 U.S. at 451 (White, J., dissenting); and Jeffers v. Ricketts, 832 F.2d at 488 (1987) (dissenting opinion). The impossibility of requiring states to apply this aggravating circumstance in a principled way is demonstrated by the following statement by the majority opinion in Jeffers, 832 F.2d at 485, n. 8:

We fail to see how this action of Jeffers [disposing of the body in a shallow grave three days after the murder] can be differentiated from placing a victim alive in a weighted sack and sinking the sack into a lake. . . ."

The requirement that the aggravating circumstance in question be limited by a definition restricting its use to those murders where the victim has suffered physical torture would result in an inappropriate intrusion

into substantive punishment imposed upon murderers by the states. Cf. California v. Ramos, 463 U.S. 992, 1001 (1983) (the Court notes that it has generally "deferred to the State's choice of substantive factors relevant to penalty determination.").

B. THE REQUIREMENT THAT THE AGGRAVATING CIRCUMSTANCE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" BE INTERPRETED IN A PRINCIPLED MANNER HAS NO PURPOSE SINCE THE COURT HAS APPROVED AN AGGRAVATING CIRCUMSTANCE THAT IS MORE VAGUE IN BAREFOOT V. ESTELLE, AND JUREK V. TEXAS, AND BECAUSE THE SENTENCER CAN CONSIDER NONSTATUTORY AGGRAVATING CIRCUMSTANCES, AND EVIDENCE OF ANY MITIGATING CIRCUMSTANCE.

While the Court in Godfrey v. Georgia, 446 U.S. 420 (1980), condemned the use of an open-ended aggravating circumstance (that the offense was outrageously or wantonly vile, horrible

or inhuman in that it involved torture, deprivation of mind, or an aggravated battery to the victim."), in Barefoot v. Estelle, 463 U.S. 880, 896-99 (1983), the Court, citing California v. Ramos, 463 U.S. 992, 1005-06 (1983), and Jurek v. Texas, 428 U.S. 262, 274-76 (1976), held that the probability that the defendant would constitute a continuing threat to society," was a valid aggravating circumstance. In Barefoot, the Court made clear that "the likelihood of a defendant's committing further crimes is a constitutionally acceptable criterion for imposing the death penalty" Id. at 896.

The State contends that this aggravating circumstance is more vague than the one at issue in the present

case, "especially heinous, atrocious, or cruel." If a jury could validly impose the death sentence upon a defendant based on an aggravating circumstance which required the jury to predict future conduct, as Barefoot and Jurek, say it may, then it makes little sense to hold that the aggravating circumstance "especially heinous, atrocious, or cruel" is overbroad if it involves a consideration of the attitude of the killer and the manner of killing. If anything, an aggravating circumstance that requires a jury to speculate as to whether a defendant is going to commit crimes in the future gives the jury more discretion than if it merely decides whether the crime was "especially heinous, atrocious, or

cruel." A decision that a crime is "especially heinous, atrocious, or cruel" involves an assessment of concrete, historical facts, while the prediction of future conduct is incapable of objective analysis.⁷

In California v. Ramos, 463 U.S. 992, 1001-06 (1983), the Court upheld the giving of an instruction that advised the capital jury that the governor was empowered to grant a reprieve, pardon, or commutation of a sentence. The Court held that "[t]he

⁷ In Ledewitz, The New Role of Statutory Aggravating Circumstances in American Death Penalty Law, 22 Duq. L. Rev. 317, 387-88 (1984), the author complains that, with reference to aggravating circumstances similar to the one in question in Barefoot, "[w]hatever the underlying merits of executing a defendant to prevent future harm, these circumstances are wildly overbroad and empirically inaccurate" [footnote omitted].

approval in Jurek of explicit consideration of the [the defendant's probable future dangerousness] defeats [Ramos'] contention that, because of the speculativeness involved, the State of California may not constitutionally permit consideration of commutation" [footnote omitted]. Id. at 1003.

This discussion is relevant to a consideration of the true function of a sentencer. The Court in Barefoot and Jurek noted that the task performed by a Texas jury in weighing the prospect that the defendant might commit crimes in the future "is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." Barefoot, 463 U.S. at 897, quoting Jurek, 428 U.S. at 274-76.

Oklahoma contends that the purpose of aggravating circumstances should be to give guidance to a sentencer when imposing the death sentence, see Poland v. Arizona, 476 U.S. 147, 156 (1986) ("[a]ggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment."), and to genuinely narrow the class of persons eligible for the death sentence, Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988). They should not be a vehicle to give federal courts supervisory review over whether state courts are appropriately evaluating the death penalties imposed in their jurisdictions. Cf. Pulley v. Harris, 465 U.S. 37, 43-44 (1984)

(states are not required to conduct proportionality reviews of the death sentences imposed in their jurisdictions).

Furthermore, a state could adopt enough aggravating circumstances so that every murder scenario could be covered by one or more of them.⁸ See, e.g., Utah Code Ann. 76-5-201 (Supp. 1987) (seventeen threshold offenses).⁹

⁸ In California v. Ramos, 463 U.S. 992, 999 (1983), the court noted that it has not undertaken "to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision." Cf. Ledewitz, supra note 6, at 369-70.

⁹ In Andrews v. Shulsen, 802 F.2d 1256, 1261-62 (10th Cir. 1986) the Tenth Circuit (construing the Utah statute which at that time contained eight threshold offenses) noted that under the Utah capital sentencing scheme, the jury would consider, in addition to those threshold offenses specifically listed, any other facts involving the defendant's character, (continued...)

Some states have aggravating circumstances that relate to who the victim is. In Ledewitz, The New Role of Statutory Aggravating Circumstances in American Death Penalty Law, 22 Duq. L. Rev. 317, 377-81 (1984) [hereinafter The New Role] it is pointed out that state aggravating circumstances apply to all different types of victims, from news reporters to court officials.

Other aggravating circumstances relate to the treatment to which the victim was subjected. See The New Role, 22 Duq. L. Rev. at 390-94.

⁹(...continued)
background, history, and mental and physical condition. See also Barclay v. Florida, 463 U.S. 939 (1983); and Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987) (it is constitutional for a sentencer to consider non-statutory aggravating circumstances).

Some states have as an element of the "especially heinous, atrocious, or cruel" aggravating circumstance that the victim suffered psychological torture, see Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1984) (Florida), while another state's aggravating circumstance is if murder is committed "by lying in wait."¹⁰ Fleemor v. State, 514 N.E.2d 80, 88 (Ind. 1987). In The New Role, 22 Duq. L. Rev. at 393, the author notes that Nevada "identifies random killing, without motive, as a statutory aggravating circumstance" [footnote omitted]. These different aggravating

¹⁰ In the present case, the Court of Criminal Appeals, in discussing why the murder was "especially heinous, atrocious, or cruel," noted that the Defendant "either lay in wait for him or returned under cover of darkness." 695 P.2d at 554.

circumstances apparently cover situations where the victim knows he or she is going to be killed and where he or she does not know it is going to happen.

Furthermore, Oklahoma contends that from the cases Proffitt v. Florida, 428 U.S. 242 (1976), and Gregg v. Georgia, 428 U.S. 153 (1976), which held that a sentencer's discretion be guided, federal courts have moved to the holding by the Tenth Circuit in the present case, and by the Ninth Circuit in Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), that aggravating circumstances must be capable of objective analysis, which ultimately, means that the findings of such by state juries and appellate courts are subject to intensive review by the

federal judiciary. Cf. Godfrey v. Georgia, 446 U.S. 420, 450 (White, J., dissenting) ("our role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of the facts that quite reasonably - perhaps even quite plainly - fit within the statutory language.").

In Jeffers v. Ricketts, 832 F.2d 476, the Ninth Circuit set aside the death sentence in a case involving the Arizona Supreme Court's interpretation of "especially heinous, atrocious, or cruel." The Ninth Circuit held that the Arizona Court's holding that "especially heinous, atrocious, or cruel" had several components, one of which was that the defendant relished the crime, made the application of

"especially heinous, atrocious, or cruel" invalid because "[o]f all of the components of heinousness and depravity set forth by the Arizona Supreme Court . . . none is more subjective than the relishing of the crime by the defendant." Id. at 484.

The Ninth Circuit in Jeffers also held that because of the definitions of "especially heinous, atrocious, or cruel" set forth by the Arizona Supreme Court, the Ninth Circuit was "unable to find a principled means of distinguishing the depravity of Jeffers' conduct from that in State v. Watson" Id. at 485.

Therefore, in addition to striking down state death sentences because they disagree with the way the state appellate courts are distinguishing

between different kinds of horrible murders, one panel of the Ninth Circuit,¹¹ and the Tenth Circuit now holds, in essence, that aggravating circumstances must not be "subjective" in nature. Apart from the unlikelihood of any entity being able to make principled comparisons of different murders and having to say that some are less heinous than others¹² (a weighing

¹¹ As noted previously, another panel in the Ninth Circuit has upheld Arizona's application of the aggravating circumstance in question. Woratzeck v. Ricketts, 820 F.2d 1450, 1458 (9th Cir. 1987).

¹² In his dissent in Godfrey, Chief Justice Burger contended that the Court was now assuming "the task of determining on a case-by-case basis whether a defendant's conduct is egregious enough to warrant a death sentence." 442 U.S. at 443. It has been observed that Godfrey has been criticized by both sides in the capital punishment debate. See "Especially Heinous" 64 N.C.L. Rev. at 964, n. 129; (continued...)

process that might not be appreciated by the victims in the cases found not to be quite as "heinous" as others), we now have an intrusion into state sentencing processes that seems inconsistent with principles of federalism. Cf. Pulley v. Harris, 465 U.S. 37 (1984).

The primary evils that existed in the imposition of the death sentence condemned by this Court in Furman v. Georgia, 408 U.S. 238 (1972) were: racism, id. at 250, n. 15 (Douglas, J., concurring); infrequency of imposition, id. at 313-14 (White, J., concurring); and the unpredictability of upon whom the death sentence is to be imposed,

¹²(...continued)
and Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1780 (1987).

id. at 309-10 (Stewart, J., concurring).

With regard to the first rationale behind Furman, the elimination of racism in the capital sentencing process, there is no showing that requiring a state appellate court to do the impossible, that is, to place a different value on different murders in different cases involving different defendants, has reduced the potential for racism being a factor in the imposition of the death sentence in this country. Cf. McCleskey v. Kemp, 107 S.Ct. 1756, 1781 (1987) (Brennan, J., dissenting). A better way of combating racism in the imposition of the death sentence would be through close scrutinizing of the jury selection, Batson v. Kentucky, 476

U.S. 79 (1986), Turner v. Murray, 476 U.S. 28 (1986), the prosecutor's closing arguments, Darden v. Wainwright, 106 S.Ct. 2464 (1986), and Caldwell v. Mississippi, 472 U.S. 320 (1985), and the effectiveness of trial counsel, Strickland v. Washington, 466 U.S. 668 (1984).

As for the infrequency of punishment argument, Oklahoma contends that the constant changing of the rules that govern the death sentence is why only ninety-four executions have occurred in this country since 1967.¹³ See Coleman v. Balkcom, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting from the denial of certiorari). Since there are nearly 2000 persons on death row in

¹³ Nat'l L. J., Feb. 15, 1988, at 31, col. 1.

this country,¹⁴ and because no state legislature has repealed the death sentence since 1976, the failure to impose the death sentence is not due to reluctance on the part of the people or their elected representatives, and the states should not, therefore, be blamed for the lack of frequent executions in this country. See also Gregg v. Georgia, 428 U.S. at 182.

With regard to the unpredictability of who is to receive the death sentence, since under our system prosecutors have total discretion as to who is to receive the death penalty, see McClesky v. Kemp, 107 S.Ct. 1756 (1987), and Gregg v. Georgia, 428 U.S. at 199, it makes no sense to attempt to engraft some predictability in state

¹⁴ Id.

capitol sentencing schemes regarding upon whom juries will impose that sentence. Furthermore, juries inevitably will make different decisions in different cases. Also, because juries are considered to be buffers against governmental arbitrariness in our system, it is anomalous to give the government total discretion against whom it is going to seek the death penalty, yet minimize jury discretion in the matter.

Also, if in applying the "especially heinous, atrocious, or cruel" aggravating circumstance, state appellate courts must define such so that there can be a principled means of distinguishing between different types of cases, presumably they must apply the same principle to the aggravating

circumstance concerning predictions of future conduct, to insure that it is being applied in a logical manner. The impossibility of this task is evident, and would dispatch any court engaged in such an attempt down the same slippery slope that has been the problem since Godfrey.

Another reason why a rule requiring "objective" aggravating circumstances is unworkable is because this Court has previously held that a sentencer can rely on nonstatutory aggravating factors in imposing the death penalty. See Barclay v. Florida, 463 U.S. 939 (1983) (judge's consideration of the defendant's criminal record, which was not a statutory aggravating circumstance, did not invalidate death sentence), Zant v. Stephens, 462 U.S.

862 (1983), and The New Role, 22 Duq. L. Rev. at 319.

In Wainwright v. Goode, 464 U.S. 78 (1983), the Court upheld the death sentence in a case where the sentencing judge had relied on the nonstatutory aggravating circumstance of future dangerousness. There is no reason why statutory aggravating circumstances are to be held to a strict standard of objectivity if nonstatutory aggravating circumstances can be considered, particularly those involving a prediction of future dangerousness.

The third reason why it is futile to require states to interpret "especially heinous, atrocious, or cruel" in a way that eliminates all subjective aspects is that this Court has repeatedly held that a capital

sentencer must be permitted to consider any relevant mitigating evidence relating to a defendant's character or background. Skipper v. South Carolina, 476 U.S. 1 (1986). See also California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring) (jury instructions "must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character. . . ."). Since the jury has complete and unguided discretion, cf., Franklin v. Lynaugh, 823 F.2d 98, cert. granted, 108 S.Ct. 221 (1987), as to what it considers to be mitigating, and with regard to whether it outweighs the aggravating circumstances, the decision regarding mitigating evidence is completely

subjective.¹⁵ Therefore, because subjective consideration of mitigating evidence has been injected into the capital sentencing formula, it is illogical to require the prosecution to rely only on objective aggravating circumstances.

Oklahoma urges the Court to accept its view that aggravating circumstances are guidelines for the sentencer's use, and a means to genuinely narrow the class of persons subject to the death penalty, and they should not be a device by which federal courts become intimately involved in the capital sentencing decision. Most

¹⁵ In The New Role, 22 Duq. L. Rev. at 350, n. 126, the author notes that in Gregg and Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court "approved unlimited discretion in the decision not to impose the death penalty." (Emphasis original.)

sentencing guidelines are vague to a certain extent, and to eliminate vagueness means to disregard the purpose of a sentencer - to exercise its discretion while being guided by certain criteria. "Any sentencing decision calls for the exercise of judgment." Barclay, 463 U.S. at 950.

PROPOSITION II.

THE FINDING BY THE JURY OF THE EXISTENCE OF A SECOND AGGRAVATING CIRCUMSTANCE, THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MORE THAN ONE PERSON, GENUINELY NARROWED THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE SO THAT THE IMPOSITION OF THE DEATH SENTENCE IN THE PRESENT CASE, WHICH WAS BASED ON THE JURY'S FINDING OF TWO AGGRAVATING CIRCUMSTANCES, WAS CONSTITUTIONAL.

In the present case, the jury found, in addition to the existence of the aggravating circumstance "especially heinous, atrocious, or

cruel," that the acts of the defendant "knowingly created a great risk of death to more than one person." Okla. Stat. tit. 21, § 701.12(2) (1981) (J.A. 18). There is no question that the facts of this case fully support this aggravating circumstance, and that the aggravating circumstance is sufficiently specific. The Tenth Circuit, however, held that since juries in Oklahoma weighed aggravating and mitigating circumstances, and the Oklahoma Court of Criminal Appeals did not reweigh such when it reviewed the Defendant's death sentence, the holding in Barclay v. Florida, 463 U.S. 939 (1983) was applicable, and the death sentence was invalid.

In Lowenfield v. Phelps, 108 S.Ct. 546 (1988), the Court held that a

jury's finding in the second stage of the existence of only one aggravating circumstance, "knowingly creat[ing] a risk of death or great bodily harm to more than one person," was sufficient to support the death sentence even though it was merely a duplication of the underlying offense of the first degree murder for which the defendant was convicted in the guilt stage. The Court held that the finding by the jury sufficiently performed the narrowing function, and it was irrelevant whether this was done at the guilt or the sentencing phase of the trial. Id. at 554.

In the present case, the jury found the existence of essentially the same aggravating circumstance as did the jury in Lowenfield. The only difference

in the two cases is that in the present case the jury found the existence of a second aggravating circumstance, "especially heinous, atrocious, or cruel."

In Zant v. Stephens, 462 U.S. 862, 890 (1983) the Court stated:

Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

In the present case the Tenth Circuit answered this question by holding that "[a] death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be

vacated under the Eighth and Fourteenth Amendments." 822 F.2d at 1483. The Tenth Circuit held that the present case was different from Zant because Oklahoma's death penalty scheme requires the sentencer to "weigh" aggravating against mitigating circumstances, whereas under Georgia law, the state involved in the Zant decision, there is no requirement that aggravating circumstances be balanced against mitigating circumstances. Id. at 1479.

The distinction between those two types of sentencing processes was noted by this Court in Barclay v. Florida, 463 U.S. 939, 954 (1983). In Barclay, however, in his concurring opinion, Justice Stevens noted that "the Constitution does not prohibit

consideration at the sentencing phase of information not directly related to either statutory aggravating or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime." Id. at 967.

In the present case the evidence supporting the aggravating circumstance "especially heinous, atrocious, or cruel" was directly related to the character of the defendant and the circumstances of the crime. Furthermore, the instruction did not enumerate what the mitigating circumstances would be, merely stating that "[t]he determination of what are mitigating circumstances is for you as jurors to resolve under the facts and

circumstances of this case" (Instruction No. 17) (J.A. 12). See also Okla. Stat. tit. 21, § 701.10 (West 1983) (mitigating circumstances are not enumerated). Cf. Barclay v. Florida, 463 U.S. at 962-63 (Stevens, J., concurring) (aggravating circumstances are weighed against "statutorily enumerated mitigating circumstances").

Oklahoma contends that the finding of the aggravating circumstance, that the defendant knowingly created a great risk of death to more than one person, in addition to the one involving the "especially heinous, atrocious, or cruel" standard, was a sufficient "individualized determination on the basis of the character of the individual and the circumstances of the crime. . . ." Zant, 462 U.S. at 879

(emphasis original). Also, these aggravating circumstances sufficiently narrowed the class of persons subject to the death sentence, Lowenfield v. Phelps, 108 S.Ct. at 554-55, and the imposition of the death sentence in the present case was, therefore, constitutional.

This is particularly true in view of the fact that the Oklahoma Court of Criminal Appeals conducted a proportionality review in the present case. Cartwright, 695 P.2d at 555, n. 7. Furthermore, the aggravating circumstance "especially heinous, atrocious, or cruel" was not found by the Oklahoma Court of Criminal Appeals to be invalid under state law. Since the Florida court's use of nonstatutory aggravating circumstances was held to

be a matter of state law in Barclay, the Oklahoma Court of Criminal Appeals' finding in the present case that the evidence supported the "especially heinous, atrocious, or cruel" aggravating circumstance should also be considered to be a matter of state law, and the Tenth Circuit's use of the state appellate court's construction of such to invalidate the death sentence where a second and concededly valid second aggravating circumstance was found seems inconsistent with Barclay.

Finally, in the present case, all of the evidence admitted to prove "especially heinous, atrocious, or cruel" would have been admissible to prove "great risk of death to more than one person." In Zant, 462 U.S. at 886, the Court noted that the evidence used

in support of the invalid aggravating circumstance was "fully admissible in the sentencing stage." The Court also stated:

Thus, any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he had been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant.

462 U.S. at 887.

Because of the reasoning of the Tenth Circuit in this case, it is therefore presumably important whether the jury in Lowenfield, a Louisiana state case, also performed a weighing function with regard to aggravating and

mitigating circumstances. See Cartwright, 822 F.2d at 1481-83.¹⁶

Review of other Louisiana cases demonstrates that there is no difference between the function performed by juries in that state and juries in Oklahoma. In Welcome v. Blackburn, 793 F.2d 672, 677-79 (5th Cir. 1987), a Louisiana case, the prosecutor argued and presented evidence on only one aggravating circumstance (that the defendant "knowingly created and risk of death or great bodily harm to more than one person") and the trial judge read the entire list of aggravating and mitigating circumstances to the jury. The jury found the existence of the one

¹⁶ Obviously, Lowenfield was issued after the Tenth Circuit decided the present case.

argued by the prosecutor, and also found that the killing was "committed in an especially heinous, atrocious, or cruel manner." The Fifth Circuit held:

Where the jury finds at least one aggravating circumstance that was valid and supported by the evidence, this Court has ruled that the refusal to review the validity of additional aggravating circumstances found by the jury is permissible as long as the jury's finding of arguable invalid aggravating circumstances "affected none of petitioner's substantial rights." Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982).

793 F.2d at 678.

The court also stated:

Welcome asserts that the jury's unwillingness to impose the death penalty for the murder of Maturin demonstrates that they imposed the death penalty for his killing of Guillory based solely upon a finding of heinousness. Under State v. Culberth, 390 So.2d 847 (La. 1980), the aggravating circumstance of heinousness is satisfied only if the killing involves torture or

the pitiless infliction of unnecessary pain on the victim. Welcome asserts that there was no proof that would satisfy this standard. Assuming this is so, we find that the clear proof of the first aggravating circumstance - the killing of two persons in a consecutive course of conduct - is sufficient to demonstrate that the jury finding of heinousness was harmless error.

793 F.2d at 678 (footnote omitted). Oklahoma contends, therefore, that the factual and legal situations in the present case is identical to that in Welcome.

In Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, 476 U.S. 1153 (1986), the court, in rejecting a defendant's contention that, since the Louisiana Supreme Court had previously held that one of the aggravating circumstances was unconstitutionally vague, the death

sentence in his case must also be invalidated, stated:

David, however, is readily distinguishable from the instant case. In David, "a significant prior history of criminal activity" was the sole aggravating circumstance found by the jury. Here, the jury found two other aggravating circumstances supporting their recommendation of the death sentence. It is now settled law that "a death sentence supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."

(Emphasis original.) See also Williams v. Maggio, 679 F.2d 381, 386-90 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (death sentence properly upheld where the Louisiana Supreme Court reviewed only one of the three aggravating circumstances found by the jury).

These cases are significant because under Louisiana's capital punishment scheme, which this Court dealt with in Lowenfield, the jury weighs the aggravating circumstances against mitigating circumstances when determining whether to impose the death sentence. See State v. Willie, 410 So.2d 1019, 1033 (La. 1982) appeal after remand, 436 So.2d 554 (1983) where the court stated:

Having found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance(s) so found, before recommending the more appropriate penalty, either a penalty of life imprisonment without parole or a sentence of death. State v. Sonnier, 402 So.2d 650, 657 (La. 1981).

See also State v. Knighton, 436 So.2d

1141, 1158 (La. 1983), cert. denied, 465 U.S. 1051 (1984).

These pronouncements might appear to be contradicted by those of the Fifth Circuit in Wilson v. Butler, 813 F.2d 664, 674 (5th Cir. 1987), which stated that Louisiana law does not require weighing of aggravating against mitigating circumstances. This statement was supposedly based on review of the Louisiana sentencing statute, La. Code Crim. Pro. Ann. 905.3 (West 1986), and the court's reading of several Louisiana cases.

The above-mentioned sentencing statute states:

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

(Emphasis added.)

Obviously, the jury is engaged in a weighing process if it considers both the aggravating circumstance it has found and then imposes sentence, and the question of whether the jury either "weighed" or "considered" each is basically a matter of semantics. See also Gray v. Lucas, 677 F.2d 1086, 1106 (5th Cir. 1982), on rehearing, 685 F.2d 139 (5th Cir. 1982), cert. denied, 463 U.S. 1237 (1983) (under Mississippi law the jury weighs aggravating against mitigating but may still sentence the defendant to life even if aggravating circumstances outweigh mitigating circumstances).

The second basis for the court's belief in Wilson v. Butler, 813 F.2d at 674, that juries in Louisiana do not

weigh aggravating circumstances and mitigating circumstances is three Louisiana cases. 813 F.2d at 674, n. 36. Perusal of two of the cases, however, reveal that they hold only that a defendant is not entitled to an instruction that the jury should recommend the death sentence only if the aggravating factors outweigh the mitigating factors. See State v. Jones, 474 So.2d 919, 932 (La. 1985); and State v. Welcome, 458 So.2d 1235, 1246-47 (La. 1983). The third case, Sawyer v. State, 442 So.2d 1136, 1137-39 (La. 1983) merely states that nothing in Louisiana's statutory scheme requires that the jury must find the existence of at least one statutorily aggravating circumstance before the defendant can be sentenced to death.

Significantly, the court noted that "the finding of statutory aggravating circumstances is simply a preliminary step before any balancing process can be undertaken." (Emphasis original) (footnote omitted). Id. at 1139. Cf. State v. Flowers, 441 So.2d 707, 716-17 (La. 1983) ("[h]aving found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance so found, before recommending that the sentence of death can be imposed.") (emphasis added).

Therefore, contrary to the Fifth Circuit's statement in Wilson v. Butler, under Louisiana law the jury does weigh the aggravating against the mitigating circumstances in capital

cases. See Williams v. Maggio, 679 F.2d 381, 389 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983) (en banc opinion involving Louisiana capital case where Fifth Circuit noted that "[w]hen one or more of the statutory aggravating circumstances is found, the jury must balance this against the mitigating circumstances offered by defendant").

In Zant v. Stephens, 462 U.S. 862, 880 (1983), the Court held that the Constitution does not require states to adopt specific standards regarding the weighing of aggravating circumstances. In Barclay, the Court stated that the Constitution does not require "that the sentencing process be transferred into a rigid and mechanical parsing of

statutory aggravating factor." 463 U.S. at 950.

In Barclay, Justice Stevens in his concurring opinion noted that in Florida and Georgia, "even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not required to impose the death penalty." 463 U.S. at 963. Certainly, in the present case, under Oklahoma's capital sentencing scheme, the jury was free to find mitigating circumstances outweighing any number of aggravating circumstances and impose a life sentence upon the Defendant.

In Oklahoma, the jury also is not required to impose a death sentence if the aggravating circumstances outweigh

the mitigating circumstances. In the present case the jury was instructed as follows (Instruction No. 15):

Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these Instructions.

Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In the event, the sentence must be imprisonment for life.

(J.A. 11) (emphasis added).

This is consistent with Oklahoma law. In Parks v. State, 651 P.2d 686, 693 (Okla. Crim. App. 1982) it was stated:

As was properly stated in Instruction No. 7, if the jury does not find unanimously beyond a reasonable doubt one or more of the statutory circumstances existed, they would not be authorized to consider the penalty of death, and the sentence would automatically be imprisonment for life.

See also Oklahoma Uniform Jury Instructions (Criminal) 437. Furthermore, as noted previously, under Oklahoma law in effect at that time, the Oklahoma Court of Criminal Appeals conducted a statutorily required proportionality review, which was considered to be important in a Fifth Circuit case involving Louisiana's capital punishment scheme. Knighton v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984).

The interchangeability of the words "consider" and "weigh" with regard to a jury's measuring one against the other in deciding whether to impose the

death sentence demonstrates that the alleged difference between the Georgia, Louisiana, and Oklahoma death penalty schemes are really distinctions without a difference. Under Georgia law the jury is required to consider "any mitigating circumstances." Ga. Code Ann. § 17-10-30 (1982). Since "[t]he sentencing authority can assign what it deems the appropriate weight to particular mitigating circumstances. . . ." Moore v. Balkcom, 716 F.2d 1511, 1521-22 (11th Cir. 1983), supplemented, 722 F.2d 629 (11th Cir. 1984), cert. denied, 465 U.S. 1084 (1984), Georgia juries obviously perform a weighing process. Furthermore, the Constitution would be violated if the sentencer were precluded from considering mitigating

circumstances. Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982). Therefore, these juries obviously weigh mitigating circumstances against the aggravating circumstance[s] they have found.

As noted previously, under Oklahoma law the jury in the present case was neither limited by enumerated mitigating circumstances, nor was it required to impose the death sentence upon the finding of one or more aggravating circumstance. Furthermore, the finding of the "especially heinous, atrocious, or cruel" aggravating circumstance should not affect the death sentence since another one was found by the jury. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980) (only one overbroad aggravating circumstance

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was found by the jury). Also, this is not a case where the State is relying solely on a nonstatutory aggravating circumstance. Cf. Zant v. Stephens, 462 U.S. at 876, and Barclay v. Florida, 463 U.S. at 966-67 (Stevens, J., concurring) ("a death sentence may not rest solely on a nonstatutory aggravating circumstance.") (emphasis original).

Since the jury found the existence of the aggravating circumstance, that the defendant "knowingly created a risk of death or great bodily harm to more than one person" (the identical aggravating circumstance to the sole one found by the Louisiana jury in Lowenfield), the class of persons subject to the death sentence has been genuinely and sufficiently narrowed.

That the Louisiana jury in Lowenfield found, as an element of the crime of capital murder in the guilt stage, that the Defendant intended to kill or inflict great bodily harm on more than one person, is irrelevant because in the present case the Defendant was found guilty of killing the victim Hugh Riddle "with malice aforethought," and was convicted of Shooting With Intent to Kill with regard to Charma Riddle. Therefore, Lowenfield and the present case are factually and legally the same with regard to the narrowing function performed by the jury.

CONCLUSION

For the reasons stated, respectfully requests that the judgment of the

United States Court of Appeals for the
Tenth Circuit be reversed.

Respectfully submitted,

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APPENDIX "A"

"HEINOUS, CRUEL" STATES

- Alabama - Ala. Code § 13A-5-49(8)
(1981)
The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.
- Arizona - Ariz. Rev. Stat. Ann.
§ 13-703F(6) (Supp. 1985)

The defendant committed the offense in an especially heinous, cruel or depraved manner.
- Arkansas - Ark. Stat. Ann. § 5-4-604(5) (1987)

The capital murder was committed in an especially heinous, atrocious or cruel manner.
- California - Cal. Penal Code § 190.2
(a)(19) (West Supp. 1978)

The murder was especially heinous,

atrocious or cruel manifesting exceptional depravity. As utilized in this section the phrase "especially heinous, atrocious or cruel manifesting exceptional depravity" means a consciousnessless or pitiless crime which is unnecessarily torturous to the victim.

Colorado - Colo. Rev. Stat. § 16-11-103(1)(6)(6xj) (1986)

The defendant committed the offense in an especially heinous, cruel or depraved manner.

Connecticut - Conn. Gen. Stat. § 53a-46a(h)(1) (1985)

The defendant committed the offense in an especially heinous, cruel or depraved manner.

Delaware - Del. Code Ann. tit., § 4209(e)(1) (1987)

The murder was outrageously or wantonly vile, horrible

or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering time.

Florida - Fla. Stat. § 921.141(5)(h) (1984)

The capital felony was especially heinous, atrocious or cruel.

Georgia - Ga. Code. Ann. § 17-10-30(b)(7) (1981)

The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated batter to the victim.

Idaho - Idaho Code § 18-4505(6)(d) (1987)

The kidnapping was especially heinous, atrocious or cruel manifesting exceptional depravity.

4a

Idaho Code § 19-2515(g)(5) (1987)

The murder was especially heinous, atrocious or cruel manifesting exceptional depravity.

Illinois - Ill. Rev. Stat. ch. 38, § 9-1(b)(7) (Supp. 1987)

The murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.

Louisiana - La. Code Crim. Proc. Ann. art. 905.4(a)(7) (West Supp. 1987)

The offense was committed in an especially heinous, atrocious or cruel manner.

Mississippi - Miss. Code Ann. § 99-19-101(5)(h) (Supp. 1983)

The capital offense was

especially heinous,
atrocious or cruel.

Missouri - Mo. Rev. Stat.
§ 565.032(2)(7) (Supp.
1984)

The murder in the first
degree was outrageously
or wantonly vile,
horrible or inhuman in
that it involved
torture or depravity of
mind.

Nebraska - Neb. Rev. Stat. § 29-
2523(1)(d) (1985)

The murder was
especially heinous,
atrocious, cruel or
manifested exceptional
depravity by ordinary
standards of morality
and intelligence.

Nevada - Nev. Rev. Stat.
§ 200.033(8)

The murder involved
torture, depravity of
mind or the mutilation
of the victim.

New
Hampshire - N.H. Rev. State. Ann.
§ 630:5(II)(a)(7)
(1986)

The murder was exceptionally heinous, atrocious or cruel.

New Jersey - N.J. Rev. Stat. § 2C:11-3(c)(4)(c) (Supp. 1986)

The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated assault to the victim.

North Carolina - N.C. Gen. Stat. § 15A-2000e(9) (1981)

The capital felony was especially heinous, atrocious or cruel.

Oklahoma - Okla. Stat. tit. 21, § 701.12(4) (1981)

The murder was especially heinous, atrocious or cruel.

South Dakota - S.D. Codified Laws Ann. § 23A-27A-1(6) (Supp. 1981)

The offense was outrageously or wan-

tonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

Tennessee - Tenn. Code Ann. § 39-2-203(i)(5) (1981)

The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.

Utah - Utah Code Ann. § 76-5-202(1)(q) (Supp. 1985)

The homicide was committed in an especially heinous, atrocious, cruel or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse or serious bodily injury of the victim before death.

Wyoming - Wyo. Stat. § 6-2-102(h)(vii) (Supp. 1983)

The murder was espe-

8a

cially heinous, atrocious or cruel.

Supreme Court of the United States
October Term 1967

GRAY D. MATTHEW, WARDEN, et al.
Petitioners

WILLIAM THOMAS CARTWRIGHT
Respondent

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals for the Tenth Circuit erred in holding that Oklahoma's interpretation and application of its "especially heinous, atrocious or cruel" aggravating circumstance in this case violated the constitutional requirement of *Godfrey v. Georgia*.

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**COUNTER STATEMENT OF CONSTITUTIONAL
PROVISIONS INVOLVED**

United States Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

No State shall . . . deprive any person of life . . . without due process of law

COUNTER STATEMENT OF CASE

A. Guilt-Innocence Proceeding

Mr. Cartwright was employed by Hugh and Charma Riddle in their construction business in 1981 and 1982. T 381-82. In December, 1981, Mr. Cartwright injured his leg on the job. T 409. He was fired in January, 1982, after he and Mr. Riddle had a disagreement over the payment of medical bills for treatment of his work-related injury. T 477-78.

Mr. Cartwright had been a good friend and valued employee of the Riddles. T 405, 475, 478. However, when Mr. Riddle fired him, he felt betrayed and apparently suffered considerable emotional distress. T 101, 124-25. This was the only conflict between Mr. Cartwright and the Riddles prior to the homicide. T 405, 478. After Mr. Cartwright was fired, he moved to Nevada. He returned to Muskogee, Oklahoma on May 1. T 481-82.

On May 4, 1982, Mr. Cartwright walked to the Riddles' home to talk with Mr. Riddle about his claim for medical benefits. T 487-488. The prosecution theorized that the Riddles were not home when Mr. Cartwright arrived and that he either waited for them or returned later in the evening. T 601.

The shooting occurred when Charma Riddle unexpectedly discovered Mr. Cartwright in the hall with a shotgun belonging to her husband. According to her testimony, she grabbed the gun, "pushed it aside and it went off." T 391, 411. She fell, and Mr. Cartwright shot her again. T 412. Mr. Cartwright then went into the living room and shot Mr. Riddle. T 391. Mr. Riddle died instantly. T 311. Thereafter, Mr. Cartwright and Mrs. Riddle struggled, and he stabbed her with a knife. T 394.

Two days after the crime, Mr. Cartwright voluntarily turned himself in to the authorities. T 220. At that time, he was emotionally distraught, shaking, and had difficulty talking. T 223, 224, 440. He could not remember many of the events preceding and following the offense. T 467-90.

The shooting of Mr. and Mrs. Riddle was strikingly inconsistent with Mr. Cartwright's previous history. He had no prior criminal record of any kind. T 469-71. And he had no history of violent or assaultive behavior. According to the testimony of relatives and previous employers, Mr. Cartwright had always been a good and dependable employee, had not shown any tendency toward violence, and had usually avoided disputes. T 430-67.

Mr. Cartwright was convicted of first degree murder for the death of Mr. Riddle.¹

B. Sentencing Proceeding

The court conducted a separate sentencing hearing to determine Mr. Cartwright's punishment for the murder.²

¹ At the same trial, Mr. Cartwright was convicted of shooting with intent to kill and sentenced to seventy five years in the penitentiary for the shooting of Charma Riddle.

² In seeking the death sentence, the prosecution relied upon three

The evidence introduced at the first stage was incorporated into the sentencing stage.

In accordance with Oklahoma law, the court instructed the jury that if it did not find one or more statutory aggravating circumstances beyond a reasonable doubt, it was prohibited from considering the death penalty. J.A. 12. The jury was instructed that "[a]ggravating circumstances are those which increase the guilt or enormity of the offense," J.A. 11, and that "unless [it] . . . unanimously found[] that any such aggravating circumstance or circumstances outweigh[ed] the finding of one or more mitigating circumstances, the death sentence [could] not be imposed." J.A. 12-13.

With regard to the aggravating circumstances "the murder was especially heinous, atrocious, or cruel," the following instruction was given:

As used in these Instructions, the term "heinous" means extremely wicked or shockingly evil, "atrocious" means outrageously wicked and vile, "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

J.A. 12.

The jury found that the murder was especially heinous, atrocious or cruel and that Mr. Cartwright created a great risk of danger to more than one person. It thereupon

statutory aggravating circumstances under Oklahoma's capital sentencing statute: (1) the defendant created a great risk of danger to more than one person; (2) the murder was especially heinous, atrocious, or cruel; and (3) there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. J.A. 6, 7. See *Idaho*, 354 U.S. 21, 55-791 (1957); 791 (1974); 791 (1977); (1981).

sentenced him to death. The jury rejected the prosecutor's claim that Mr. Cartwright was a continuing threat to society. J.A. 18-19.

C. Oklahoma Court of Criminal Appeals' Decision

On appeal, Mr. Cartwright challenged the constitutionality of Oklahoma's "especially heinous" aggravating circumstance under *Godfrey v. Georgia*, 446 U.S. 420 (1980) because the Oklahoma Court of Criminal Appeals had not adopted a limiting construction of the provision. In addition, Mr. Cartwright challenged the application of the circumstance in his case. R. Vol. VIII, Appellant's Brief, 43-48. Rejecting Mr. Cartwright's claims, the Court of Criminal Appeals distinguished Oklahoma's "especially heinous" aggravating circumstance from Georgia's similar statutory provision because Oklahoma's statute is written in the disjunctive. J.A. 29. The court held that it was proper "to gauge whether the murder was heinous, atrocious, or cruel in light of the circumstances attendant to the murder." J.A. 30 (emphasis supplied). The court summarized all of those circumstances and found that they "adequately supported the jury's finding." J.A. 31.

D. *En Banc* Opinion of the Tenth Circuit Court of Appeals

The Tenth Circuit, in a unanimous *en banc* opinion, reversed the United States District Court's denial of Mr. Cartwright's petition for a writ of habeas corpus as to his death sentence. *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987); J.A. 35.

The question, as framed by the Tenth Circuit, was whether Oklahoma "has met the constitutional challenge of defining circumstances and terms that deter arbitrary and unpredictable sentencing decisions and provide ade-

quate justification for imposing the death penalty . . . , and "whether the application of Oklahoma's 'especially heinous, atrocious, or cruel' aggravating circumstance satisfied the requirements of the Constitution in this case." J.A. 49.

The state argued that "the terms 'heinous,' 'atrocious,' and 'cruel,' coupled with their definitions, direct the attention of the sentencer to the manner of killing and the attitude of the killer." J.A. 64-65. The Tenth Circuit rejected this argument, in part, "for the same reason that the conclusory statement that the offense was 'outrageously wicked and vile, horrible and inhuman' was inadequate in *Godfrey*: 'There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.' 446 U.S. at 428." J.A. 63. It observed that the Oklahoma court has said only that "the attitude of the killer, the manner of the killing, the suffering of the victim, and all of the circumstances of the offense are *relevant considerations* in determining whether [to uphold a jury's finding that] a murder was 'especially heinous, atrocious, or cruel.'" J.A. 65 (emphasis supplied). Oklahoma has never articulated any standard that explains which manners of killing, which attitudes of the killer, or which circumstances attendant to a murder distinguish those murders in which death may be imposed from those in which it may not. J.A. 65-69.

The Tenth Circuit held that Oklahoma's interpretation and application of "especially heinous, atrocious, or cruel" accordingly failed to meet the requirements of *Godfrey*: the state had not adopted a construction of the provision which narrowed the class of murders to which it applied and "had failed to apply a constitutionally required narrowing construction in this case." J.A. 69. The Tenth

Circuit did not undertake to prescribe for Oklahoma "what narrowing construction of the 'especially heinous, atrocious, or cruel' aggravating circumstance would satisfy the constitutional requirements," leaving that decision to the state "in the first instance as it construes its own laws in light of constitutional requirements." J.A. 70-71.

E. Subsequent Developments in Oklahoma Law

In *Stouffer v. State*, 742 P.2d 562, 563 (Okla.Cr. 1987) (on rehearing), the Oklahoma Court of Criminal Appeals noted the Tenth Circuit's *en banc* decision in Mr. Cartwright's case and adopted a narrowing construction of the "especially heinous, atrocious, or cruel" aggravating circumstance that limits its application "to those murders in which torture or serious physical abuse is present." *Id.* Stouffer's jury found three statutory aggravating circumstances, including the "especially heinous" circumstance. Applying the narrowing construction in *Stouffer*, the court held that "the evidence . . . [did] not support a finding . . . that the murder was especially heinous, atrocious, or cruel." *Id.* at 563-64. Nevertheless, considering the remaining aggravating circumstances and other evidence, the court determined that the jury's finding of the "especially heinous" circumstance was harmless error and affirmed the death sentence.³

³ At no stage of the present case did Oklahoma ever argue that the jury's consideration of the "especially heinous" circumstance was harmless error or that it had no effect on the jury's weighing process or its decision to impose a death sentence on Mr. Cartwright. In fact, in argument in opposition to an application for a stay of execution in *Coleman v. Saffle*, No. 87-2011 (10th Cir. July 20, 1987), the state distinguished *Cartwright* from *Coleman* by pointing out that it "didn't even argue harmless error in Cartwright because the circum-

SUMMARY OF ARGUMENT

If a state authorizes capital punishment "it has a constitutional responsibility [under the Eighth Amendment] to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. at 428. At a minimum, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546, 554 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). If a statutory scheme utilizes aggravating circumstances as a means to "genuinely narrow" the death-eligible class, the state must apply them "according to an objective legislative definition." *Lowenfield*, 108 S.Ct. at 554. The Tenth Circuit faithfully followed these settled principles in holding that the writ must be granted in Mr. Cartwright's case, because "the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of 'especially heinous, atrocious, or cruel' in this case." J.A. 69.

Oklahoma, like most states, relies upon findings of specified aggravating circumstances to narrow the class of persons eligible for the death penalty. An Oklahoma jury must find that one or more statutory aggravating circumstances has been established, and that the statutory

stances of the crime were too much like the *Godfrey* decision, plus the lack of aggravating circumstances other than great risks [sic] of death to more than one person." Tr. of Oral Argument, p. 33. Oklahoma did argue below that a valid aggravating circumstance is *per se* sufficient to uphold a death sentence based in part on a constitutionally invalid aggravating circumstance. But this Court specifically limited the grant of *certiorari* to exclude that issue.

aggravating circumstances are not outweighed by mitigating circumstances, before it may impose a sentence of death. Okla. Stat. tit. 21, § 701.11 (1981).

One of the statutory aggravating circumstances which can form the basis for death eligibility is: "The murder was especially heinous, atrocious or cruel." Okla. Stat. tit. 21, § 701.12(4). At the time of Mr. Cartwright's trial and appeal, the Oklahoma Court of Criminal Appeals had not limited the meaning of this aggravating circumstance except by listing synonyms for each of the three disjunctive, pejorative terms of the statute. The terms and their synonyms can plausibly be applied to any murder and thus do not limit the jury's discretion to impose the death sentence, nor do they provide a principled basis for reviewing a jury's decision.

In Mr. Cartwright's case, the instructions to the jury concerning the "especially heinous, atrocious or cruel" circumstance provided no limiting definitions or principles that could be used to "differentiate this case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed." *Zant*, 462 U.S. at 879.

Similarly, on direct appeal the Oklahoma Court of Criminal Appeals sustained the jury's finding of this circumstance without articulating any limiting standard or limited set of facts which supported—or was necessary to support—the finding. Instead, the court recited the terms "heinous," "atrocious," and "cruel" in the disjunctive, J.A. 30, and relied upon a compendious, unanalyzed summary of the "circumstances attendant to the murder," J.A. 30, to sustain the jury's finding of the circumstance. Such a broad and undefined interpretation of the "especially heinous" circumstance imposes no limits

on the imposition of the death sentence. As the Tenth Circuit aptly observed, "[t]he discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*." J.A. 68.

Oklahoma contends that the Tenth Circuit erred in finding anything wrong with a process such as this. It argues repeatedly that there is no "principled way" to distinguish degrees of heinousness in murders and that any attempt to do so—by requiring, for example, that the application of the "especially heinous, atrocious, or cruel" circumstance be limited to those homicides in which the victim has been tortured or has suffered serious physical abuse before death—will impermissibly encroach upon the sentencer's necessarily subjective exercise of discretion. While purporting to acknowledge that the Eighth Amendment function of aggravating circumstances is to guide the sentencer's discretion and genuinely narrow the class of persons eligible for a death sentence, Oklahoma argues that these purposes can be accomplished by (1) instructing the jury baldly to consider whether a particular murder was "especially heinous, atrocious or cruel," and (2) having a state appellate court review the sufficiency of the evidence by reference to all the circumstances of the case, including the "attitude" of the killer, the suffering of the victim, and the manner of the killing.

The most striking thing about this submission is that *Godfrey* forecloses it completely. The state does not even try to argue that the meaning of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance has been narrowed by judicial construction as required by *Godfrey*. In its entire voluminous brief—half devoted to an issue which this Court excluded from argument by limiting the grant of *certiorari*—only two decisions of the

Oklahoma Court of Criminal Appeals apart from Cartwright's are cited—neither for its bearing upon the Oklahoma state-law definition of “especially heinous, atrocious, or cruel.” Thus, the state has abandoned (necessarily as we will show) the contention that *Godfrey* was incorrectly applied by the Tenth Circuit; it is reduced to contending that *Godfrey* should simply not be followed; and although this is the inescapable conclusion of its arguments, it neither asks the Court to overrule *Godfrey* nor suggests any reason why *Godfrey* should be overruled. No intelligible basis for reversal being offered, the judgment below must necessarily be affirmed.

ARGUMENT

I.

THE EIGHTH AMENDMENT REQUIREMENT THAT THE STATES NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH SENTENCE ON THE BASIS OF CLEAR AND OBJECTIVE STANDARDS APPLIES TO OKLAHOMA'S USE OF THE “ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL” CIRCUMSTANCE.

A. The Constitutionally Necessary Narrowing Function of Aggravating Circumstances

Since *Furman v. Georgia*, 408 U.S. 238 (1972), one of the two foundation pieces of Eighth Amendment death-penalty jurisprudence has been the requirement that the sentencer's discretion be “suitably directed and limited.” As the oft-quoted passage from *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), explained it,

[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

In the nearly two decades since *Furman*, the virtually universal vehicle through which the capital sentencer's discretion has been suitably directed and limited is the statutory aggravating circumstance. Whether statutory aggravating circumstances are required to be found in the guilt-innocence phase of the trial, see *Jurek v. Texas*, 428 U.S. 262 (1976); *Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546 (1988), or at the penalty phase of the trial, these circumstances “circumscribe the class of persons eligible for the death penalty,” *Zant*, 462 U.S. at 878, by focusing the sentencer's attention upon “the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.” *Gregg*, 428 U.S. at 192. Through aggravating circumstances, “the types of murders for which the death penalty may be imposed become more narrowly defined and limited to those which are particularly serious or for which the death penalty is peculiarly appropriate” *Id.* at 222 (White, J., concurring).

To accomplish this “constitutionally necessary narrowing function,” *Pulley v. Harris*, 465 U.S. 37, 50 (1984),

[E]ach statutory aggravating circumstance must satisfy a constitutional standard derived from *Furman* itself. For a system ‘could have standards so vague that they would fail adequately to channel the decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.’ . . . To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant, 462 U.S. at 876-77 (citation and footnote omitted).

A state cannot satisfy the narrowing requirements of the Eighth Amendment by merely providing the sentencer "relevant information under fair procedural rules," *Gregg*, 428 U.S. at 192, especially if the sentence is imposed by a jury. Most jurors have no experience in sentencing, particularly in murder cases. *Id.* Without clear standards to guide their consideration of a multitude of factors, juries will be unable to determine which factors about the crime and the individual defendant are generally present in all murders and which factors provide a rational basis for imposing death in one case but not in others. *Id.* Also, without clearly defined standards that limit discretion, it is far more likely that individual decisions will be based upon prejudice and caprice or other impermissible considerations. *See Gregg*, 428 U.S. at 197 ("while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. . . .'").

To "genuinely narrow" the class of persons eligible for the death penalty, statutory aggravating circumstances must, "in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not,'" *Godfrey*, 446 U.S. 420, 427-428 (1980) (quoting *Gregg*, 428 U.S. at 188), by referring to objective, readily identifiable facts whose presence or absence can be determined by rational sentencers. "[C]apital sentencing decisions must not be made on mere whim, but instead on clear and objective standards. . . ." *California v. Brown*, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J. concurring). Each statutory aggravating circumstance must, accordingly, incorporate "an objective legislative definition." *Lowen-*

field, 108 S.Ct. at 554. Only through such clearly defined standards can statutory aggravating circumstances perform the critical sorting function mandated by the Eighth Amendment: "adequately differentiat[ing] [a death-eligible] case in an objective, evenhanded, and substantively rational way from the many . . . murder cases in which the death penalty may not be imposed." *Zant*, 462 U.S. at 879.

When deciding whether a particular death penalty scheme meets Eighth Amendment requirements, the Court "[h]as not stopped at the face of [the] statute, but [has] probed the application of the statutes to particular cases." *McCleskey v. Georgia*, ___ U.S. ___, 107 S.Ct. 1756, 1773 (1987) (discussing *Godfrey*). In doing so, the Court has explained more fully the constitutional prerequisites for statutory aggravating circumstances. These prerequisites were fatal to Georgia's application of its "outrageously or wantonly vile" aggravating circumstance in *Godfrey* and are similarly fatal to Oklahoma's application of its "especially heinous" aggravating circumstance, as the Tenth Circuit *en banc* unanimously found.

B. For An "Especially Heinous" Type of Aggravating Circumstance to Perform A Narrowing Function, It Must Be Construed to Apply Only To An Objectively Defined, Limited Class of Murders

Prior to the grant of certiorari in the present case, the Court has had only one occasion to determine whether a particular state's construction and application of the "especially heinous" type of aggravating circumstance provided sufficiently "clear and objective" guidance to perform a genuine narrowing function. In 1980, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court specifically addressed this question with respect to Georgia's "(b)(7)" circumstance—whether the murder was "outrageously or

wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery of the victim." 446 U.S. at 423. Since this Georgia circumstance is the virtual equivalent of Oklahoma's "heinousness" circumstance, the Court's treatment of it is material to the analysis of Mr. Cartwright's case. Indeed, because of the striking legal and factual similarities between Mr. Cartwright's case and Mr. Godfrey's case, *Godfrey* provides the analytical blueprint for Mr. Cartwright's case.

Robert Godfrey was charged with and convicted of two counts of murder for the deaths of his wife and mother-in-law and one count of aggravated assault for the beating of his young daughter. 446 U.S. at 424-26. Following a heated telephone conversation with his wife, Godfrey went to his mother-in-law's home, taking a shotgun with him. Through the window, he saw his wife, his mother-in-law and his 11-year-old daughter playing cards. He pointed the shotgun at his wife, and shot her in the forehead, killing her instantly. As he entered his mother-in-law's trailer, he struck and injured his young daughter with the barrel of the shotgun. He then pointed the gun at his mother-in-law and shot her in the forehead, killing her instantly. When he was arrested, he told police officers "I've done a hideous crime, . . . but I have been thinking about it for eight years . . . [and] I'd do it again." 446 U.S. at 425-426.

Godfrey's jury was instructed in the statutory language of the (b)(7) circumstance. 446 U.S. at 426. Death sentences were imposed on both counts of murder, and the jury specifically found that "the offense of murder was outrageously or wantonly vile, horrible and inhuman," omitting the last clause of the statutory language. 446 U.S. at 426. The Georgia Supreme Court affirmed the

sentence, "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428.

In discussing the application of Georgia's (b)(7) circumstance to the facts in *Godfrey*, the Court emphasized the state's responsibility to "define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" 446 U.S. at 428. In order to constitutionally impose the death penalty, the Court explained, as it had before and as it has since, that a state "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.* When the process of imposing Godfrey's death sentence was analyzed in light of these principles, the Court found the process woefully inadequate.

In the first place, the instructions to the jury placed no limits upon the application of the (b)(7) circumstance to the facts of Godfrey's case. The instructions simply recited the terms of (b)(7) without attempting to explain them. The Court found

nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms.

446 U.S. at 428-29.

Moreover, the Court found that "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court," 446 U.S. at 429, for in the process the Georgia court abandoned its rule which had previously limited the application of the circumstance. The Court found that prior decisions of the Georgia court had construed the latter portion of (b)(7)—"in that it involved torture, depravity of mind, or an aggravated battery to the victim"—in such a way as to identify clear and objective limiting standards related to the manner of killing, since those decisions had held that "torture," "depravity of mind" and "aggravated battery" were to be interpreted "in pari materia" and were not to be applied in the disjunctive. 446 U.S. at 430-431.

While the Court in *Godfrey* was concerned with the lack of inherent restraint in the language of the first portion of the aggravating circumstance—"outrageously or wantonly vile, horrible and inhuman"—it was similarly concerned in *Gregg* about the language in the latter portion, noting that "depravity of mind or an aggravated battery" could be used to describe any murder. 428 U.S. at 201. If these words were considered in the disjunctive and separated from a requirement that the homicide involve torture, they would also fail to constrain the sentencer's discretion. The Georgia court's early decisions had satisfied both of these concerns by interpreting "depravity of mind" as the mental state that "led the murderer to torture or to commit an aggravated battery before killing his victim," *Godfrey*, 446 U.S. at 431, and requiring evidence of torture or an aggravated battery to the victim to sup-

port a finding of "outrageously or wantonly vile, horrible or inhuman."⁴

In *Godfrey's* case, however, the Georgia court abandoned these limiting principles and approved an application of (b)(7) that would permit its use in any case where a jury subjectively felt that the offense was "outrageously or wantonly vile, horrible and inhuman." By failing to require that *Godfrey's* murders involve the objectively ascertainable facts of "torture, or an aggravated battery to the victim," the Georgia court disregarded the only meaningful restrictions it had previously placed on the (b)(7) circumstance. For these reasons, *Godfrey's* death sentence could not stand. As the Court later characterized its decision in *Godfrey*, "the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 878. See *California v. Ramos*, 463 U.S. 992, 1000 (1983) (citing *Godfrey* as an example of a death sentence that was reversed because it rested on "unconstitutionally broad and vague construction of an aggravating circumstance");

⁴ While Justice White, joined by Justice Rehnquist, dissented from the judgment in *Godfrey*, Justice White was in agreement that the limiting principles established by the Georgia court's prior decisions were necessary if the (b)(7) circumstance was to perform a narrowing function. As he explained,

In one excursus on the provision's language, the court in effect held that the section is to be read as a whole, construing 'depravity of mind,' 'torture,' and 'aggravated battery' to flesh out the meaning of 'vile,' 'horrible,' and 'inhuman.' . . . I see no constitutional error resulting from this understanding of the provision. Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provision disjunctively, . . . an analysis that, if adopted, would arguably be assailable on constitutional grounds.

446 U.S. at 454.

and *McCleskey*, 107 S.Ct. at 1773 (citing *Godfrey* as an example of the invalidation of Georgia's interpretation of an aggravating circumstance that was "so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion"). Compare *Proffitt v. Florida*, 428 U.S. 242, 255-256 (1976) (emphasizing that the Florida Supreme Court had explicitly adopted and thereafter had consistently adhered to a limiting construction of Florida's "especially heinous" aggravating circumstance).

C. Oklahoma Utilizes the "Especially Heinous, Atrocious or Cruel" Circumstance to Narrow the Class of Persons Eligible For The Death Penalty

The Eighth Amendment's requirement that aggravating circumstances provide objective, rational criteria for "suitably direct[ing] and limit[ing]" sentencing discretion is focused upon the sentencer's "threshold" determination of the defendant's death-eligibility.

As the Court explained in *Zant* and *Barclay v. Florida*, 463 U.S. 939 (1983), the process of determining the sentence in a capital trial involves two stages: (1) the threshold or "categorical narrowing" determination of whether the defendant is within the class of murderers eligible for the death penalty and (2) the individualized determination of whether death is the appropriate penalty for the particular defendant. *Zant*, 462 U.S. at 874-79; *Barclay*, 463 U.S. at 954; *id.* at 962-64 (Stevens, J., joined by Powell J., concurring). The threshold determination requires objectively defined and limited aggravating circumstances. At the threshold stage, "the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *McCleskey*, 107

S.Ct. at 1774. See also *Lowenfield*, 108 S.Ct. at 554 (by finding one or more statutory aggravating circumstances at the threshold stage, "the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition").

Oklahoma utilizes its statutory aggravating circumstances, including the "especially heinous, atrocious or cruel circumstance," to define the threshold of death eligibility. In this regard, its death-sentencing process is similar to both Georgia's and Florida's.

Under Oklahoma law, any person convicted of murder in the first degree is punishable by death or imprisonment for life. Okla. Stat. tit. 21, § 701.9A (1981). First degree murder includes all intentional unlawful homicides and all homicides, regardless of intent, committed during the course of enumerated felonies. Okla. Stat. tit. 21, § 701.7 (1981).⁵ See Brief of Petitioners at 4 (setting forth the text of the statute).

If a person is convicted of first degree murder, punishment is determined by the jury at a separate sentencing hearing. Okla. Stat. tit. 21, §§ 701.10-701.12. See Brief of Petitioners at 5-8. Oklahoma's death-penalty statute narrows the class of persons subject to the death penalty by requiring the jury to find that one or more of eight enumerated aggravating circumstances exists—including the circumstance that "the murder was especially heinous, atrocious, or cruel," § 701.12(4)—and that the statutory aggravating circumstances are not outweighed by any mitigating circumstance. § 701.11. J.A. 12-13.

⁵ Unlike Louisiana and Texas, Oklahoma does not build its statutory aggravating circumstances into its definition of capital murder. Cf. *Lowenfield*, 108 S. Ct. at 554-555.

Oklahoma law does not specify the factors to be considered as mitigating circumstances.⁶ It limits the jury's consideration of aggravating circumstances to those enumerated in the statute, but it does not provide any standards for weighing aggravating against mitigating circumstances. *Chaney v. State*, 612 P.2d 269, 279 (Okla.Cr. 1980); *Brogie v. State*, 695 P.2d 538, 543-544 (Okla.Cr. 1985). In returning a death verdict, the jury must specify the aggravating circumstances found, but it is not required to specify anything regarding mitigating circumstances. J.A. 13.

Clearly, the only feature of the statutory scheme which operates to narrow the categories of murder eligible for the death penalty is the definitions of the enumerated aggravating circumstances. Since the jury's finding and weighing of the "especially heinous, atrocious or cruel" statutory aggravating circumstance enters into the threshold determination of death-eligibility in Oklahoma in any case in which it is at issue, it follows that the "especially heinous" aggravating circumstance must be objectively defined and limited in its application in order to perform this "constitutionally necessary narrowing function," *Pulley*, 465 U.S. at 50. The question before the Court is whether Oklahoma interpreted and applied the "especially heinous" aggravating circumstance in Mr. Cartwright's case in such a way as to meet the controlling Eighth Amendment command.

⁶ The instruction given in Mr. Cartwright's case defined mitigating circumstances as "those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case." J.A. 12.

The court below found that it did not. Oklahoma argues here that it did, but without analyzing or even citing the pertinent decisions of the Oklahoma Court of Criminal Appeals that define the reach of the "especially heinous" aggravating circumstance. This omission is surprising only until the actual Oklahoma caselaw is examined. For, as the following discussion demonstrates, that caselaw leaves no doubt at all that the Tenth Circuit was correct when it concluded, "there is no constitutionally adequate narrowing construction [of especially heinous, atrocious, or cruel] adopted by the Oklahoma courts" J.A. 70.

II.

IN CONCLUDING THAT THE OKLAHOMA COURTS IN MR. CARTWRIGHT'S CASE FAILED TO GUIDE THE SENTENCER'S DISCRETION BY CONSTITUTIONALLY ADEQUATE STANDARDS, THE TENTH CIRCUIT FAITHFULLY APPLIED THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT TO REACH A RESULT THAT FOLLOWS A FORTIORI FROM GODFREY.

The Tenth Circuit correctly recognized that *Godfrey* controls this case. The two cases are indistinguishable except that Oklahoma law defining its "especially heinous" circumstance was less suited to serve a genuine narrowing function in Mr. Cartwright's case than was Georgia law in Mr. Godfrey's. Here, as in *Godfrey*, the victim died instantly from a gunshot wound.⁷ Here, as in *Godfrey*, Oklahoma had once interpreted its "especially

⁷ Indeed the sequence of events was not materially different in either case, except that Godfrey killed two persons and Mr. Cartwright killed one. Godfrey shot and killed one victim with a shotgun, by shooting her through the window of her trailer. He then entered the trailer and struck and injured his daughter with the barrel of the shotgun. Thereafter, he pointed the gun at the second homicide victim and shot her in the forehead, killing her instantly.

heinous" factor as requiring evidence of physical abuse or torture—an objective standard which the Court recognized in both *Godfrey* (446 U.S. at 429-432) and *Proffitt v. Florida* (428 U.S. at 255-256) has the potential to serve as an appropriate principle in narrowing the application of this aggravating circumstance. But here, as in *Godfrey*, the sentencing jury was not instructed that, in order to find that the murder was especially heinous, atrocious or cruel, it must first find that the victim was tortured or physically abused. Rather, it was directed to make a wholly subjective judgment—based on nothing more than its own emotional response to the crime spread before it—as to whether the murder was "especially heinous, atrocious or cruel." And finally, as in *Godfrey*, the Oklahoma appellate court "in no way cured" "[t]he standardless and unchanneled imposition of [the] death sentence[] in the uncontrolled discretion of a basically uninstructed jury," 446 U.S. at 429. To the contrary, the Court of Criminal Appeals on Mr. Cartwright's appeal eschewed any narrowing construction of the limitless statutory language and sanctioned the imposition of the death sentence simply by upholding the jury's "especially heinous" finding in consideration of all of "the circumstances attendant to the murder." J.A. 30.

In view of these extraordinary parallels to *Godfrey*, the Tenth Circuit could properly have decided, without additional analysis, that *Godfrey* controls. It did not do that. Instead, it bent over backwards, searching all of the Court of Criminal Appeals' decisions to see whether any of its expressed rationales for applying the "especially heinous" circumstance provided a principled basis for finding the circumstance in Mr. Cartwright's case consistent with the use of the circumstance to perform a genuine narrowing function. Only after this painstaking analysis

did the court conclude that "the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of 'especially heinous, atrocious, or cruel' in this case." J.A. 69. Oklahoma has presented no substantial argument—nor can it—that the Tenth Circuit's analysis of either state law or the Eighth Amendment principles applicable to it is in any way or detail incorrect.

A. The Tenth Circuit's Search For An Objective Standard Limiting the Application of "Especially Heinous, Atrocious, or Cruel"

The Tenth Circuit began its analysis with an explanation of the narrowing function of an aggravating circumstance. Its explanation demonstrates an accurate understanding of, and faithful adherence to, the principles that the Court has articulated consistently from *Gregg* to *Lowenfield*:

The narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination. Thus, aggravating circumstances must be described in terms that are commonly understood, interpreted and applied. To truly provide guidance to a sentencer who must distinguish between murders, an aggravating circumstance must direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty.

J.A. 53.

Recognizing this Court's previously-expressed concern that the "especially heinous" circumstance could arguably be found in every murder unless its application is limited by some kind of objective standard, J.A. 55-57, the Tenth Circuit assiduously examined the Oklahoma Court of Criminal Appeals' decisions prior to *Cartwright* to deter-

mine whether the Oklahoma court had articulated and adhered to an objective standard limiting the application of the circumstance. J.A. 57-61. Because this was a crucial step in the Tenth Circuit's analysis and will be similarly critical for this Court's analysis, the pre-*Cartwright* Oklahoma decisions must be described in some detail.

In the first case calling for an appellate construction of the "especially heinous, atrocious or cruel" circumstance, *Eddings v. State*, 616 P.2d 1159 (Okla.Cr. 1980), *reversed on other grounds*, 455 U.S. 104 (1982), the Oklahoma Court of Criminal Appeals appeared to adopt in its entirety Florida's interpretation of that circumstance. The opinion recites the language of *State v. Dixon*, 283 So.2d 1 (Fla. 1973), with unqualified approval:

[W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

616 P.2d at 1167-1168 (emphasis supplied).

In *Eddings*, however, despite the opinion's endorsement of the *Dixon* construction of the "especially heinous" circumstance, the court upheld a finding that the shooting death of a highway patrolman was "especially heinous, atrocious or cruel" based solely upon the occupation of the victim (peace officer), the fact that he was not expecting

danger, and the use of a shotgun. *Id.* at 1168. See also *Cartwright v. State*, 695 P.2d 548, 554 (1985) (characterizing the factual basis for the holding in *Eddings*).⁸ J.A. 30.

Two months after its decision in *Eddings*, the Oklahoma court considered a jury's finding of the "especially heinous" circumstance in *Chaney v. State*, 612 P.2d 269 (Okla.Cr. 1980). The jury instructions had included the *Eddings/Dixon* definitions without the "unnecessarily torturous" limitation. On appeal, Chaney argued that the terms and their definitions could be applied to any murder. The court upheld the jury's findings and the sufficiency of the instructions, noting that "the manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty." 612 P.2d at 279.

Three months later the Oklahoma court considered this aggravating circumstance in a case involving a kidnapping/robbery murder. *Irvin v. State*, 617 P.2d 588 (Okla.Cr. 1980) (modified on other grounds). The victim had been kidnapped, robbed and bound before being shot five times and dumped in an abandoned field. The trial court instructed the jury regarding the definitions of the terms "heinous," "atrocious" and "cruel" quoted in *Eddings*, but refused a requested instruction that the aggravating circumstance was "directed only at the con-

⁸ The trial judge in *Eddings* had "found . . . that the crime was 'heinous, atrocious, and cruel' because 'designed to inflict a high degree of pain . . . in utter indifference to the rights of Patrolman Crabtree.'" *Eddings v. Oklahoma*, 455 U.S. 104, 108 n.3 (1982). Justice Powell was led to observe:

[W]e doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey v. Georgia*.

Id. at 109 n.4.

scienceless or pitiless crime which is unnecessarily torturous [sic] to the victim." The Court of Criminal Appeals upheld the trial court's refusal, commenting that "this additional statement added nothing to the definition of the terms previously defined." 617 P.2d at 599.

The decisions in *Chaney* and *Irvin* thus indicated that while the court considered the "unnecessarily torturous" language to be an inherent part of its interpretation of the circumstance, the omission of that language from the jury's instructions was not necessarily reversible error. On the basis of these cases alone, one might have concluded that the court was simply finding the absence of the limiting language non-prejudicial to the defendants because the facts supported a finding of the circumstance within the torture limitation of the *Eddings/Dixon* definition. However, such an assumption was belied by subsequent cases.

In the same month that *Irvin* was decided, the Court of Criminal Appeals affirmed a death sentence in a case in which the victim was shot twice in the head with a pistol. *Hays v. State*, 617 P.2d 223 (Okla. Cr. 1980). There was no evidence of a struggle or of suffering by the victim. The court nevertheless sustained the finding of "especially heinous, atrocious, or cruel." Holding that the sentence of death was not imposed "under the influence of passion, prejudice or any other arbitrary factor," the court observed: "This is an unusually cruel killing. The victim lived in Muskogee, and his shop was frequented by numerous residents in the area." 617 P.2d at 231. Thus, the status of the victim and the effect of his death on the community become relevant considerations in determining whether a murder is "cruel."

The court next discussed the "especially heinous" aggravating circumstance in *Burrows v. State*, 640 P.2d

533 (Okla. Cr. 1982) (modified on other grounds). In *Burrows*, the defendant shot his pregnant wife four times with a pistol as she fled down the hallway. *Id.* at 542. Although the court modified the death sentence to life imprisonment on other grounds, it specifically upheld the jury's finding that the murder was "especially heinous, atrocious, or cruel." The court recited the definition that *Eddings* had quoted from *State v. Dixon*, adding emphasis to the language "conscienceless or pitiless crime which is unnecessarily torturous to the victim." It then discussed the *Godfrey* decision and noted that the victims in *Godfrey* were killed instantaneously and that "there was no evidence of mental or physical torture preceding the killings, or any physical or mental suffering whatsoever." The court distinguished *Burrows* from *Godfrey* by pointing out that "[a]lthough [the victim in *Burrows*] did not linger a long while, she did not die immediately; and as she lay there, the life she carried, she knew, would die also." 640 P.2d at 543.

At this point in the history of Oklahoma's construction of the "especially heinous, atrocious, or cruel" circumstance it appeared that suffering by the victim could support the finding of the "especially heinous, atrocious, or cruel" circumstance, but in view of *Hays* and *Eddings*, application of the circumstance was not limited to cases in which the victim suffered. Such an interpretation was indeed approved by the court in later cases. See *Boutwell v. State*, 659 P.2d 322 (Okla. Cr. 1983) (modified on other grounds) and *Davis v. State*, 665 P.2d 1186 (Okla. Cr. 1983).

Before the next Court of Criminal Appeals decision involving the "especially heinous" circumstance, this Court issued its opinion in *Eddings*, noting its disapproval of the application of the circumstance there. See n.

8, *supra*. Soon afterwards, the Oklahoma court heeded this warning and reversed a death sentence based upon the "especially heinous" circumstance. *See Odum v. State*, 651 P.2d 703 (Okla. Cr. 1982).⁹ The murder victim in *Odum* was collecting an insurance premium from an employee at a local club. Odum attempted to persuade him to play pool for \$5.00 a game and he refused. Later in the evening, Odum waited outside for the victim, followed him to a motel, walked up to the vehicle in which he was sitting, raised a gun and shot him in the neck. When Odum returned to his car, his brother asked, "Did you get him?" and Odum answered in the affirmative. Relying upon *Godfrey's* mandate "that the death penalty not be imposed in an arbitrary or capricious manner," the court modified the death sentence to life, because "[t]here was no evidence of any physical or mental suffering whatsoever and the *manner of killing* cannot be said to lie at the 'core' of the statutory aggravating circumstance." 651 P.2d at 707 (emphasis supplied).

The language used by the court in *Odum* and other cases,¹⁰ suggested that the "manner of killing" was a factor in the court's analysis. However, without having explained the rationale by which, or the situations in which, the "manner of killing" could be especially heinous, atrocious, or cruel, the court left open to speculation what "manners of killing" could establish the circumstance. While the "manner of killing" can obviously vary from

⁹ *Odum v. State* is the only case in which the Oklahoma Court of Criminal Appeals—prior to the *en banc* Tenth Circuit opinion herein—failed to uphold a jury's finding of "especially heinous, atrocious, or cruel."

¹⁰ See *Chaney v. State*, 612 P.2d 269, 280 (Okla. Cr. 1980) ("the manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty").

case to case, the differences frequently show nothing more about the state of mind of the killer or the effect on the victim than is shown in any first degree murder. *See* Brief of Petitioners at 49, 50. The facts that a person shoots someone twice, shoots a friend, shoots a stranger, uses a shotgun instead of a rifle, or shoots a policeman does not provide any principle or standard relating to the manner of killing, suffering of the victim, or mental state of the killer which genuinely narrows the class of persons eligible for the death sentence. Nor does the mere presence of such facts provide a principled basis for appellate review of the sentencing decision. Yet, with the sole exception of *Odum*, the Oklahoma court has sustained the finding of "especially heinous, atrocious, or cruel" in cases which span this entire range, and it has never articulated any standard that explains why these killings were in any fashion worse than the norm.

The brevity of its regard for the teachings of *Godfrey*, as well as its disregard of the limitations implied by the *Dixon* language, is exemplified by its subsequent decisions in *Boutwell v. State*, 659 P.2d 322 (Okla. Cr. 1983) and *Davis v. State*, 665 P.2d 1186 (Okla. Cr. 1983). In *Boutwell*, the court approved a finding of "especially heinous, atrocious, or cruel" where there was no evidence that the victim was tortured or suffered. In fact, the Oklahoma Court of Criminal Appeals later relied upon *Boutwell*—in Mr. Cartwright's case—to show that "[torture] of the victim is not a necessary [factor]." J.A. 29-30. *Boutwell* was convicted of a murder which occurred during the robbery of a grocery store. The victim was shot five times. The court upheld the finding of the "especially heinous" circumstance because *Boutwell* "planned well in advance to take the victim's life . . . and [Boutwell] and the victim knew each other." *Boutwell*, 659 P.2d at 322.

See also J.A. 30 (stating that the murder in *Boutwell* "was 'especially heinous, atrocious, or cruel,' because the defendant, who knew the victim, planned the murder well in advance").

In *Davis v. State*, the defendant was convicted of two counts of murder. The killings occurred during a dispute with his estranged wife, her two brothers and their friend at the Davis' apartment. Davis fired six shots, killing two people and wounding two others. The jury found, among other aggravating circumstances, that the murders were "especially heinous, atrocious, or cruel" and imposed the death penalty. On appeal, Davis challenged the evidentiary basis for the jury's finding of this circumstance, specifically pointing to the Florida interpretation inaugurated by *Dixon* which requires a showing of torture or physical or mental suffering to the victim preceding the killing. The court acknowledged that this was the general interpretation of the Florida court, but rejected Davis' contention on the following basis:

[I]n construing 21 O.S. Supp. 1976 § 701.12(4) we are not [sic] bound only by the limitation that our interpretation not be open-ended. *Gregg v. Georgia*, *supra*. Accordingly we find that since appellant perpetrated a mass-murder by inflicting multiple gunshot wounds to his victims, the jury was presented with sufficient evidence from which they could find the acts 'atrocious' as defined in the instructions.

665 P.2d at 1202, 1203.

Davis thus confirms what any fair analysis of the earlier cases shows: that the Oklahoma Court of Criminal Appeals has never utilized Florida's limiting language—"the conscienceless or pitiless crime which is unnecessarily torturous to the victim"—as a limitation at

all. In the words of the Tenth Circuit, "[t]he Oklahoma Court of Criminal Appeals has never held that this language is mandatory" J.A. 60. Rather, the language refers simply to one kind of offense that can be considered especially heinous, atrocious or cruel. Under the court's definitions and applications of these terms, there can be innumerable others, dependent only upon the court's subjective, case-specific review of the manner of killing, the attitude of the killer, and the circumstances surrounding the killing. See *Stouffer v. State*, 742 P.2d 562, 563 (Okla.Cr. 1987), acknowledging that the terms and definitions "could apply to many murders"; see also Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 941, 986 (1986), noting the "remarkably inclusive" application of this circumstance in Oklahoma, often based on "whatever [the Oklahoma court] finds distasteful about a murder." That this was in fact the standard was made even clearer in the cases that followed.

In *Robison v. State*, 677 P.2d 1080 (Okla.Cr. 1984), the defendant was convicted of three counts of first degree murder and received three death sentences. The killings took place during the robbery of a house shared by the three victims. The jury found that the murder of one of the victims was "especially heinous, atrocious, or cruel." The court concluded that "[d]eath occurring at close range by two gunshots between the eyes amply supports a finding that death occurred in a heinous, atrocious, or cruel manner." 677 P.2d at 1088.

In *Nuckols v. State*, 690 P.2d 463 (Okla.Cr. 1984), there was evidence of a beating which inflicted multiple skull fractures, lacerations, injuries to the brain, several fractured ribs and injury to the genitals. Although the court

rejected Nuckols' argument that there was no evidence of suffering, it went on to say:

Even if we accepted appellant's claim, *Eddings* and subsequent cases make clear that suffering of the victim is not the major factor we consider regarding this aggravating circumstance. As we noted in *Odum*, the 'manner of killing' is a relevant consideration, as well as the circumstances surrounding the homicide. *Odum, supra; Stafford v. State*, 669 P.2d 285, 299 (Okl.Cr. 1983). We also have examined the killer's attitude to learn if it was especially pitiless or cold. *Boutwell v. State*, 659 P.2d 322, 329 (Okl.Cr. 1983) and *Jones v. State*, 648 P.2d 1251 (Okl.Cr. 1982). . . .

We find both the circumstances leading up to [sic] and the manner in which the homicide was committed, sufficiently atrocious to be at the 'core' of the circumstance.

690 P.2d at 472, 473.

If the Oklahoma court did at one time intend to adopt a limiting interpretation of this aggravating circumstance, subsequent cases demonstrate that it had either abandoned the limitation or applied it so inconsistently that it no longer provided any genuine narrowing of the class of death-eligible murders long prior to the decision below. The Court of Criminal Appeals had persistently declined to adopt any coherent limiting principle or standard to confine the reach of the "especially heinous" circumstance and had committed itself to the practice of subjectively evaluating all of the episodic facts before it in each case, finding on all but one occasion that some combination of these facts was sufficient to establish that the murders were "especially heinous, atrocious or cruel." It was pursuant to this practice that the Court of Criminal Appeals

reviewed the finding of "especially heinous, atrocious, or cruel" in Mr. Cartwright's case.

B. The Oklahoma Court's Decision In Cartwright And The Tenth Circuit's Analysis of It: Sentencing Discretion Which Can Rely Upon All of the Circumstances of A Murder Is As Complete and As Unbridled As the Discretion Afforded the Jury in *Furman*

The Court of Criminal Appeals dismissed Mr. Cartwright's claim under *Godfrey* by noting that "according to the plurality in *Godfrey*," Georgia had defined its aggravating circumstance to mean that "torture must have been involved in the murder." J.A. 29. In contrast, it explained:

This Court has not defined the 'especially heinous, atrocious, or cruel' aggravating circumstance in such a manner.

J.A. 29. The court then declared, for the first time, that the provision is to be interpreted in the disjunctive, thereby eliminating any possible limitation which could be gleaned from its previous references to manner of killing, suffering of the victim, or "the conscienceless, pitiless crime which is unnecessarily torturous to the victim." While the court provided examples of its "disjunctive" application of the terms "heinous," "atrocious" or "cruel," it relied solely on the terms themselves and their synonyms to explain its holdings, and it did not provide any hint as to how the terms differed in application:

The statute is written in disjunctive language, and we have defined 'heinous' as 'extremely wicked or shocking evil'; ['cruel' as] 'pitiless or designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others.' *Eddings v. State*, 616 P.2d 1159 (Okl.Cr. 1980) *remanded for*

resentencing, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982).

While it is true that torture may be a sufficient factor to justify a finding that the murder was especially heinous, atrocious or cruel (see *Stafford v. State*, 665 P.2d 1205 (Okla. Cr. 1983) . . . and *Jones v. State* . . .), it is not a necessary one. In *Eddings v. State*, . . . this Court held that the fact that the victim was a police officer rendered the crime especially heinous, atrocious or cruel under the above definitions.

J.A. 29-30. The court provided other examples:

[I]n *Boutwell v. State* . . . the murder of a convenience store clerk was 'especially heinous, atrocious, or cruel,' because the defendant, who knew the victim, planned the murder well in advance. In *Davis v. State*, . . . the defendant's act of shooting his victim several times was 'atrocious.' In *Jones* . . . the defendant's acts of shooting three persons in a barroom for no apparent reason was 'extremely wicked' and 'shockingly evil.'

J.A. 30.

Considering the multitude of situations which may establish the "especially heinous" circumstance, the court announced that it was "proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder." J.A. 30. The court then summarized the prosecution's entire case against Mr. Cartwright, without placing special emphasis on any particular aspect or factor, and held that it "adequately supported the jury's finding." J.A. 31.

When the Tenth Circuit examined the Court of Criminal Appeals' treatment of the "especially heinous" circumstance in Mr. Cartwright's case, it found that

[t]he construction of 'especially heinous, atrocious, or cruel' employed by the Oklahoma Court of Criminal

Appeals in this case is a departure from the construction initially adopted in *Eddings*. The court no longer limits this aggravating circumstance to murders that are 'unnecessarily torturous to the victim,' one of the standards adopted in *Eddings* and previously approved by the Supreme Court in *Proffitt*. The court now relies upon the definitions of the terms 'heinous,' 'atrocious,' and 'cruel,' and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder.

J.A. 63. It should be noted that this description of the Oklahoma court's construction of "especially heinous, atrocious or cruel" precisely matches that which Oklahoma now offers this Court as *satisfying* the narrowing requirements of the Eighth Amendment. It is, therefore, important to see how the Tenth Circuit analyzed this construction in light of those requirements.

At the outset, the Tenth Circuit examined the definitions of each of the three terms, "heinous," "atrocious," and "cruel," and, like the Court in *Godfrey*, decided that the definitions themselves were so vague as to still permit their application to any murder.¹¹ As the court explained,

¹¹ These definitions were given at Mr. Cartwright's trial: "'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." J.A. 12.

The Tenth Circuit did note that Oklahoma's definition of "cruel," in focusing on the suffering of the victim and the defendant's attitude toward it, "is somewhat more precise . . ." J.A. 64. There were, however, two reasons why this definition failed to cure the *Godfrey* problem:

First, the Oklahoma court has clearly rejected the argument that the suffering of the victim is the major factor to be considered under this aggravating circumstance Second, because

"[v]ague terms do not suddenly become clear when they are defined by reference to other vague terms." J.A. 64. The court then turned to an examination of "the attitude of the killer, the manner of the killing, the suffering of the victim, and all the circumstances of the offense" J.A. 65.

While noting that the attitude of the killer had in some cases been found "conscienceless" or "pitiless" or "indifferent to the suffering of the victim" and had thus been deemed to support a finding of the circumstance, the Tenth Circuit concluded that the Oklahoma court looked instead to "the manner of the killing, the suffering of the victim, or the circumstances of the offense," and thus, the search for limiting principles had to focus upon these other areas. J.A. 65. As to the manner of killing, the court found that "[t]he cases in which the [Oklahoma] court has found the manner of killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed." J.A. 66. Indeed, "[t]he court has not identified which manners of killing are *not* 'especially heinous, atrocious, or cruel.'" *Id.* (emphasis in original). As to the suffering of the victim, "the [Oklahoma] court has held that it is not neces-

the Oklahoma court has emphasized that a murder need only be heinous, atrocious, or cruel, . . . even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance.

J.A. 64 (citations omitted)(emphasis in original). This latter reason—the coupling of vague terms in the disjunctive with potentially objective and limiting terms—was also identified by Justices White and Rehnquist in their *Godfrey* dissent as a construction "that would arguably be assailable on constitutional grounds." 446 U.S. at 454.

sary for the victim to have suffered for a murder to satisfy this aggravating circumstance." J.A. 67.

At bottom, the Tenth Circuit concluded, "[t]he underlying position of the Oklahoma court appears to be that it can simply review the circumstances of the murder and divine whether the murder was 'especially heinous, atrocious, or cruel.'" J.A. 67 (citing *Cartwright v. State*, 695 P.2d at 554). The constitutional shortfall in such a "limiting principle" is that it provides no basis for the confinement of an aggravating circumstance that, by its terms, "could fairly characterize almost every murder," *Godfrey*, 446 U.S. at 428-29. The Tenth Circuit explained,

"We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was 'especially heinous, atrocious, or cruel,' but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder 'especially heinous, atrocious, or cruel,' the meaning that the sentencer attached to this provision 'can only be the subject of sheer speculation.' *Godfrey*, 428 U.S. at 429 The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*. No objective standards limit that discretion."

J.A. 67-68.

Accordingly, the Oklahoma court "failed to apply a constitutionally required narrowing construction of 'especially heinous, atrocious, or cruel' in this case." J.A. 69.

III.

OKLAHOMA'S CRITICISM OF THE TENTH CIRCUIT'S
ANALYSIS MISREPRESENTS THAT ANALYSIS AND
IGNORES THE COURT OF CRIMINAL APPEALS'
SUBSEQUENT ADMISSION THAT ITS CONSTRUCTION OF
THE "ESPECIALLY HEINOUS" CIRCUMSTANCE IN
CARTWRIGHT DID NOT ADEQUATELY NARROW THE
CLASS OF DEATH ELIGIBLE CASES.

Oklahoma says that "[t]he opinion of the Tenth Circuit in *Cartwright* can be read to imply that the aggravating circumstance 'especially heinous, atrocious, or cruel' must be limited to those cases where the victim has suffered from physical abuse, and factors such as the attitude of the killer cannot be considered" Brief of Petitioners, at 37. Plainly, the Tenth Circuit does not say, and its opinion cannot "be read to imply," anything of the sort. What it says—as it must under *Zant*, *Godfrey*, *Gregg*, and *Proffitt*—is that the Oklahoma Court of Criminal Appeals is obliged to give *some* limiting construction to the "especially heinous" aggravating circumstance, and that whatever limiting construction the court adopts must be adhered to when it reviews a sentencer's finding of the circumstance. Further, the Tenth Circuit says—as *Godfrey* squarely holds—that if a state court decides to confine the "especially heinous" circumstance to cases involving torture or physical abuse (as it could properly do under *Proffitt*), it cannot turn this limiting principle on and off at random and approve a finding of the "especially heinous" circumstance where physical abuse is lacking.

Oklahoma further argues that the Tenth Circuit has forbidden the Oklahoma courts to employ a construction of the "especially heinous" circumstance which focuses upon "the attitude of the killer, the manner of the killing, or the suffering of the victim" Brief of Petitioners, at 36. To the contrary, what the Tenth Circuit actually did

was to explore each of these dimensions—the killer's attitude, the manner of the killing, and the victim's suffering—as the Court of Criminal Appeals has developed each, to see if there was any "objective standard," J.A. 68, within any of these dimensions that imposed any genuine restriction upon the classification of murders as "especially heinous, atrocious or cruel." J.A. 65-67. Only after finding that none of the dimensions imposed any such restriction did the Tenth Circuit hold that the Oklahoma court had failed to adhere to *Godfrey*, according to *Godfrey's* plain terms. In making this determination, the Tenth Circuit left open to the Oklahoma Court of Criminal Appeals the option of avoiding any future *Godfrey* problems by reinstating the "unnecessarily torturous" limiting principle which it originally adopted but then abandoned, or by adopting any other clarifying interpretation of the "especially heinous, atrocious, or cruel" language that the Court of Criminal Appeals might choose, within the wide latitude left by *Godfrey* and undiminished by the *Cartwright* opinion itself. J.A. 70.

In an effort to suggest that the Oklahoma court's construction of "especially heinous, atrocious or cruel" genuinely does ferret out the cases more deserving of death, the state goes to great lengths to isolate particular aspects of Mr. Cartwright's crime which might support an "especially heinous, atrocious or cruel" finding under a proper standard—*e.g.*, "Hugh doubtless heard the shotgun blasts which tore through Charma's body . . . [and] he quite possibly experienced a moment of terror as he was confronted by [Mr. Cartwright] and realized his impending doom." Brief of Petitioners, at 46-47 (quoting from the Court of Criminal Appeals opinion, J.A. 31). Oklahoma argues that since such aspects of the case would satisfy limited constructions of "heinous, atrocious,

or cruel" adopted in other states, Oklahoma's interpretation truly does distinguish murders more deserving of death. *Id.* at 42-48.

All of this is vastly wide of the mark, inasmuch as the Tenth Circuit never purported to decide whether Mr. Cartwright's particular offense could or could not have been characterized as especially heinous, atrocious, or cruel *on the facts*, had the Oklahoma Court of Criminal Appeals chosen to adopt a limiting principle against which to measure those facts. J.A. 70-71. The Tenth Circuit believed—and rightly—that it is altogether irrelevant whether the finding of heinous, atrocious, or cruel in Mr. Cartwright's case could have been made or sustained in other states than Oklahoma. *Godfrey's* rule is obviously not satisfied simply because there is some out-of-state jurisdiction in which an aggravating circumstance finding could be sustained under a properly limited application of the cognate circumstance. *Godfrey*, rather, entitles a condemned person to have the finding of his aggravating circumstances measured against limiting principles that have been adopted and applied with reasonable consistency by the courts in which he has been sentenced and in which his sentence is reviewed. *See Godfrey*, 446 U.S. at 432 n.15 (pointing out that some states make multiple murders an aggravating circumstance, but that Georgia had not).

An even more telling response to Oklahoma's argument was recently provided by the Oklahoma Court of Criminal Appeals itself. After the Tenth Circuit's *en banc* opinion in Mr. Cartwright's case, the Oklahoma court announced its opinion on rehearing in *Stouffer v. State*, 742 P.2d 562 (Okla. Cr. 1987). Taking note of the Tenth Circuit *Cartwright* rulings, the court acknowledged that its previous construction of "especially heinous, atrocious, or cruel"

(which relied on the definitions of terms) did not provide "objective guidance . . . and could include many murders," 742 P.2d at 563, in violation of *Godfrey*. *Id.* Therefore, the court adopted an interpretation of the circumstance which "restricts its application to those murders in which torture or serious physical abuse is present." *Id.*

Applying this limiting principle to the facts of *Stouffer*, the court clarified the nature of the "torture or serious physical abuse" with which it was concerned. The original opinion in *Stouffer*, 738 P.2d 1349, 1353 (Okla. Cr. 1987), set forth the circumstances of the homicide as follows:

Ivens [the victim of Stouffer's shooting with intent to kill] handed Stouffer a loaded .38 caliber gun. Stouffer turned to leave and then turned back around and shot Ivens in the chest and arm. He then walked over to Reaves [the victim of Stouffer's first degree murder] and shot her through her hand she had put to her head as she said, "No." Another shot was fired, but Ivens did not see it. Stouffer then returned to Ivens and shot him in the face. Stouffer left and Ivens crawled to a telephone which he used to call the police.

On rehearing, applying the "torture or serious physical abuse of the victim" limitation, the court held that the "especially heinous, atrocious or cruel" circumstance *was not supported* by these facts, because

[t]here was no reason to believe that Reaves was conscious after the first shot. She expired within minutes at the scene.

742 P.2d at 564. Even though Reaves clearly knew what was about to happen to her, and—like Hugh Riddle—heard the shots "tear through [Ivens'] body" and "quite possibly experienced a moment of terror as [s]he was

confronted by [Stouffer]" (Brief of Petitioners at 46-47) this did not amount to "torture or serious physical abuse." She suffered neither of these, because she was not conscious after the first shot and she died quickly.¹²

Under the *Stouffer* standard, it is plain that the murder of Hugh Riddle would not support a finding of "especially heinous, atrocious or cruel." For purposes of this standard the circumstances of his murder were identical to the circumstances of the murder of Linda Reaves. Oklahoma's effort to show that the subjective pre-*Cartwright* standard is necessary because of the impossibility of otherwise assessing degrees of heinousness has thus been thoroughly undermined by the very court which produced that standard. And when the Oklahoma Court of Criminal Appeals adopted what is, in its view, an "objective" standard, the murder of Hugh Riddle could no longer be deemed "especially heinous, atrocious or cruel."

¹² In cases decided after *Stouffer*, the Oklahoma court has maintained this interpretation of "torture or serious physical abuse." See *Castro v. State*, 745 P.2d 394, 408 (Okla.Cr. 1987) (exclusion of evidence that "stab wounds . . . would have caused a tremendous degree of shock and pain" removed the evidentiary support for the "especially heinous" circumstance); *Mann v. State*, 59 Okla.B.J. 76, 81 (Okla.Cr. January 5, 1988) (evidence that the victim suffered multiple contusions, cuts, a slit throat, and a broken leg prior to the fatal wound "demonstrated that [he] was undoubtedly subjected to extreme physical abuse, resulting in a great deal of pain and fright for an extended period of time"); *Hale v. State*, 59 Okla.B.J. 344, 352 (Okla.Cr. January 29, 1988) (evidence showed that the victim was conscious after being shot five times and suffered for an extended period of time before he died); *Rojem v. State*, No. F-85-485, Slip Opinion at 15 (Okla.Cr. March 16, 1988) (injuries from forcible rape and stabbing of seven year old child supported jury's finding).

IV.

**OKLAHOMA'S COMPLAINTS ABOUT THE TENTH
CIRCUIT'S OPINION ARE NO MORE THAN THINLY
VEILED EXPRESSIONS OF DISSATISFACTION WITH THE
NARROWING REQUIREMENTS OF THE EIGHTH
AMENDMENT.**

In Point II(B) of its brief, Oklahoma elaborates upon the theme that affirmance of the Tenth Circuit's opinion will signify an impermissible intrusion into the constitutionally appropriate exercise of sentencing discretion and will preclude the sentencer's subjective assessment of facts that is necessary for an individualized determination of sentence. Brief of Petitioners at 56-78. This argument is misconceived for two reasons. It fails to distinguish between the process of narrowing the class of death-eligible persons and the process of making the ultimate individualized sentencing decision. And it rests on nothing more than disagreement with the fundamental premise of post-*Furman* jurisprudence—the necessity of eliminating the arbitrary and capricious imposition of the death penalty.

Oklahoma's fear that enforcement of the Eighth Amendment narrowing requirement will intrude into the reserve of sentencing discretion required by the Eighth Amendment itself and by a practical penology reflects a failure to distinguish between the narrowing process that determines death-eligibility and the subsequent choice of sentence to be imposed upon a death-eligible individual. The narrowing determination as to whether any particular case is within the class of death-eligible offenses must be made "according to an objective legislative definition," *Lowenfield*, 108 S. Ct. at 554.

If and after this narrowing function has been properly carried out, the sentencer may exercise discretion,

unguided by objective criteria, in choosing between death and a lesser punishment.

Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.

California v. Ramos, 463 U.S. at 1008.

But while Oklahoma's expressed concern about the restriction of capital sentencing discretion is thus in part a product of misunderstanding, it is more the expression of a grievance. The state argues repeatedly that it is "impossible . . . to place a different value on different murders in different cases involving different defendants," Brief of Petitioners at 70, and refers to "the unlikelihood of any entity being able to make principled comparisons of different murders and having to say that some are less heinous than others," *id.* at 68, yet it argues vehemently that sentencers ought to be able to decide whether a person should be eligible for death because a murder is "especially heinous, atrocious, or cruel."

Such an obviously self-contradictory plea is in fact a plea to permit subjective, unrestrained feelings of horror and outrage to take the place of rational weighing of objectively-defined facts in the threshold determination of death eligibility. It is a plea in Mr. Cartwright's case to let the jury consider factors such as the youthful age of the victim—the fact that "he was a young man [30 years old] . . . and was cut down in the prime of his life." J.A. 16 (prosecutor's closing argument setting forth facts he believed "ma[d]e this a particularly atrocious and cruel crime"). See also J.A. 6 (prosecutor's bill of particulars setting forth the fact "that the deceased was only 30 years of age" in support of the "especially heinous" circum-

stance). It might be a plea in another case to let the race or class or gender of the victim be considered, for the words "especially heinous, atrocious, or cruel" and their synonyms, "extremely wicked or shockingly evil," "outrageously wicked and vile," evoke powerful feelings—feelings that if left operative will necessarily embody the class, race, gender, and age biases that still permeate the fabric of society.

In essence, Oklahoma's impassioned plea is a plea for the return of pre-*Furman* sentencing processes—for "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Gregg*, 428 U.S. at 196 n.46. Oklahoma's plea should be understood for what it is and, in keeping with all that this Court has decided in capital cases since 1972, it should be decisively rejected.

V.

THE ISSUE IN PART II OF THE BRIEF OF PETITIONERS IS NOT BEFORE THIS COURT.

We do not reply to Part II of Oklahoma's brief because it addresses an issue which this Court deliberately excluded from argument by its limited grant of *certiorari* in this case. As the Court is well aware, Oklahoma's petition for the writ presented two questions. The Court granted *certiorari* limited to Question 1. See order granting *certiorari*, No. 87-519, January 11, 1988. Nevertheless, Part II of Oklahoma's brief is—with only a change of title and a few disingenuous cosmetic brushups—Point II of its *certiorari* petition virtually *verbatim*.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted

MANDY WELCH

(Appointed By This Court)

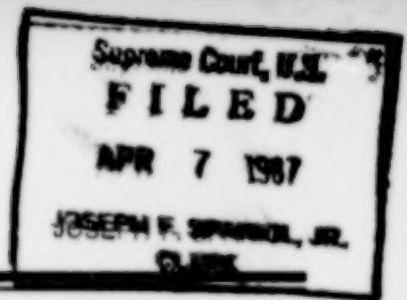
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

GARY D. MAYNARD, ET AL

Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Respondent submits this supplemental brief pursuant to Rule 35.5 of the Rules of the Supreme Court in order to call to the Court's attention the recent decision of the Oklahoma Court of Criminal Appeals in *Brown v. State*, No. 85-424 (Okla.Cr., March 23, 1988).¹

THE OKLAHOMA COURT OF CRIMINAL APPEALS HAS HELD THAT THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE REQUIRES THE PRESENCE OF TORTURE OR SERIOUS PHYSICAL ABUSE BASED UPON ITS OWN CONCLUSION THAT ITS PAST CONSTRUCTION OF THE CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE.

On March 23, 1988, the Oklahoma Court of Criminal Appeals reversed the death sentence of Ralph L. Brown because it determined that the jury's finding of the sole aggravating circumstance—"the murder was especially heinous, atrocious, or cruel"—was not supported by evidence that death was preceded by torture or serious physical abuse. *Brown*, Slip Op. at 8. Brown was convicted of the shooting death of his wife. The medical examiner testified that the victim was shot seven times and that two of the shots would have been fatal within a few minutes. Because the evidence did not establish when these two fatal shots were fired in relation to the others, the evidence was not sufficient

"to establish the requisite torture or serious physical abuse necessary to sustain the heinous, atrocious or cruel aggravating circumstance under 21 O.S. 1981, § 701.12(4), beyond a reasonable doubt as required by 21 O.S. 1981, § 701.11."

¹ Respondent was not aware of the decision in *Brown v. State* when he submitted his brief. A copy of the opinion is attached hereto as an appendix for the convenience of the Court.

Brown clarifies the Oklahoma court's basis for limiting its application of the "especially heinous" circumstance to cases involving torture or serious physical abuse:

"Recently, in *Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987) (Opinion on Rehearing), this Court agreed with the Tenth Circuit's conclusion in *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987), that this Court's past construction of the 'especially heinous, atrocious, or cruel' aggravating circumstance was unconstitutionally vague. In *Stouffer*, we held that this aggravating circumstance is applicable only where there is evidence that the death of the murder victim was preceded by torture or serious physical abuse. *Stouffer*, 742 P.2d at 563. This Court held that 'in the absence of evidence of physical or mental suffering, the aggravating circumstance that it was heinous, atrocious, or cruel was not supportable.' *Id.* at 564 (citing *Odum v. State*, 651 P.2d 703 (Okla. Cr. App. 1982))."

Id.

This decision confirms that the Oklahoma court has reached the same conclusion as the Tenth Circuit did below, that the previous Oklahoma construction of the "especially heinous" circumstance failed to narrow the category of persons eligible for the death sentence. See *Stouffer*, 742 P.2d at 563. In *Stouffer*, the Oklahoma Court of Criminal Appeals adopted as a narrowing requirement the only standard identified in any of its earlier decisions which it found sufficiently confining to meet constitutional muster. 742 P.2d at 563. It noted explicitly that this narrowing construction was not applied in *Cartwright v. State*, 695 P.2d 684 (Okla. Cr. 1985). See 742 P.2d at 563 & n.2.

In attacking the decision below, Oklahoma's brief in this Court repeatedly adverts to "the unlikelihood of any

entity being able to make principled comparisons of different murders and having to say that some are less heinous than others" (Brief of Petitioners at 68; see also *id.* at 70, 73-74) and to "an intrusion into state sentencing processes that seems inconsistent with principles of federalism" (*id.* 59; see also *id.* at 55-56, 77). The *Brown* decision, like *Stouffer* before it, illustrates the hollowness of these debater's points.

Respectfully submitted,

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APPENDIX

1a

APPENDIX A
IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA

NO. F-85-424

RALPH L. BROWN,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

OPINION

PARKS, Judge:

The appellant, Ralph L. Brown, was tried by jury in Pittsburg County District Court, Case No. CRF-84-278, and convicted of First Degree Malice Aforethought Murder (21 O.S. Supp. 1982, § 701.7), before the Honorable Steven W. Taylor, Associate District Judge. The jury found that the murder was especially heinous, atrocious or cruel, and recommended a sentence of death. Judgment and sentence was imposed in accordance with the jury's verdict. We modify the death sentence to life imprisonment and otherwise affirm.

Oklahoma Highway Patrol Trooper Oscar Garvin testified that around 3:00 a.m. on September 4, 1984, the appellant walked into the Pittsburg County Jail, told Garvin that he just killed his wife, and laid a .25 semi-automatic pistol on the counter. Garvin's testimony was corroborated by Al Durant, who was a jailer and dispatcher present at the jail. After pleading with Trooper Garvin to help his wife, the appellant led Garvin to where his wife was located. Upon arriving at the scene, Trooper Garvin found a McAlester police officer with the

victim, who was dead. Trooper Garvin then placed the appellant under arrest, read him his *Miranda* rights, and placed him in his patrol car. Garvin further testified that on the way to the station, the appellant voluntarily blurted out that "she'll never cheat on me again." Garvin testified that he did not ask the appellant any questions after he read him his *Miranda* warnings. Dr. Murlyn Bellamy, a forensic pathologist, conducted an autopsy of Karen Denise Brown, the victim, and determined that the cause of death was multiple gunshot wounds. He found seven entry wounds, two of which went through her heart and aorta and could have caused death. Dr. Bellamy found powder burns around a gunshot wound to the deceased's left arm, which indicated that the gun was close to the victim when fired. On cross-examination, Dr. Bellamy testified that the bullets entered from the victim's left upper torso, and that he could not determine whether she was laying down or sitting up when she was shot. Dr. Bellamy further testified that, because of the gunshot wounds to the heart and aorta, the victim could have survived "a few minutes at the most."

The seven bullets removed from the victim by Dr. Bellamy were ultimately turned over to James Looney, an OSBI forensic ballistics expert, who testified that five of the seven bullets were positively fired from the .25 semi-automatic pistol. Looney further identified four shell casings, which were found in the victim's car by Detective George Scott, as being fired from the same weapon.

Monte Phillips testified that while he was driving, he observed a car that had run off the road into a tree. He found the deceased lying across the front seat with her head "flush to the floorboard on the passenger side and her feet were still on the driver's side." Phillips checked the deceased for a pulse, but found none. Detective George Scott investigated the scene where the victim was found. Detective Scott testified that according to his observations, the victim's car ran off the road in front of a culvert, bounced over the culvert into a yard, and came to a stop one-hundred-fifty eight feet away against a tree. Detective Scott testified that in his opinion, the appellant fired

several shots which caused the victim to run off the road, and that the appellant then stuck his hand inside the window of the car and shot the victim four times after the car was resting against the tree. Scott based his opinion on the fact that he found four shell casings inside the victim's car, something caused the victim to run off the road, and the victim was shot seven times.

Jim Fuller testified on behalf of the appellant concerning marital problems which existed between appellant and his wife, concerning her spending of money and use of drugs. He further testified that he never saw the appellant act violent or abusive. Pat Smith testified that the appellant had a reputation as a truthful, law abiding citizen. The appellant testified that he and his wife had physical altercations over her demands for money, which he claimed she used to buy cocaine. He stated that on the morning of September 4, 1984, before he could confront his wife's mother about his wife's drug problem, his wife confronted him during an argument and pointed the .25 caliber pistol at him. The appellant talked her into giving the gun to him. Subsequently, the appellant began experiencing chest pains, and stated that the next thing he remembered was getting up from the ground with the gun in his hand and seeing his wife slumped over the steering wheel, moaning. On cross-examination, in response to the prosecutor's question to the effect that either Mrs. Brown had to shoot herself seven times or the appellant had to shoot her seven times, the appellant responded that "it appears that way." Appellant testified that he did not remember any shooting or making any statements that he killed his wife.

Dr. Bill Hutchins testified that he ran some medical tests on the appellant which indicated that the appellant had suffered a heart attack sometime prior to October, 1984. Dr. Hutchins stated that such an attack could result in loss of memory and irresponsible actions. The State then presented several witnesses in rebuttal. Max McElroy testified that on either August 24 or 25, 1984, he saw the appellant punching the deceased in the mouth. He saw the appellant get a gun out of

his car, and heard him say, "I think she's f—ing around on me." Carl Nickols, the brother-in-law of the deceased, testified that he observed the deceased with a very bad black eye in April of 1984, and that the appellant told him his wife got the black eye because "she was mouthing him, so he knocked hell out of the . . . damned bitch." The decedent's mother testified that the deceased had money when she died, that she was opposed to drug use, and that she was a happy, cheerful person. The decedent's two children testified that the appellant had pulled a gun on the deceased during their marriage. The appellant denied the foregoing testimony.

I.

ISSUES RELATING TO GUILT-INNOCENCE

A.

In his first assignment of error, the appellant contends that the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Appellant asserts that the prosecutor failed to disclose information concerning a test conducted on the appellant's hands on the morning of the homicide to determine whether he had recently fired a weapon. Defense counsel specifically requested disclosure of the results of all scientific tests. (O.R. 39-40) During the presentation of his defense, the appellant testified on direct examination that Officer Scott conducted a paraffin test on his hands. (Tr. III, at 90-91) In spite of this revelation, no objection was made at trial that the report on the paraffin test had not been disclosed. Defense counsel Foor stated that the appellant told him about the paraffin test during trial while sitting at counsel table. Clearly, defense counsel was made aware of the test during the trial so that a request for the test results could have been made, if in fact the results were withheld. At the hearing on the motion for new trial, Detective George Scott testified that such a test was conducted on the appellant and submitted to the FBI, and that the report on the test was inconclusive. Jennye Hickman testified that she personally handed the FBI report to defence counsel prior to trial.

Although both trial attorneys claimed that, to the best of their recollection, they had not been given a copy of the test results, Attorney Foor argued to the jury during closing argument that the test results on the paraffin test were negative:

I noticed that Mr. Brown testified that while he was down at the jail hurting, that Mr. Scott took a paraffin test to see whether he fired the weapon. Where's the test? Of course, to be perfectly honest with you, .25 caliber automatics usually don't throw enough powder to make the paraffin test work. But Scott didn't volunteer that he took one and it was negative. (Tr. IV, at 63)

Brady requires disclosure of evidence that is both favorable to the accused and material as to guilt or punishment. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). A constitutional error requiring a new trial exists only "if the omitted evidence creates a reasonable doubt that did not otherwise exist . . . [and] the omission must be evaluated in the context of the entire record." *Id.* at 112, 96 S.Ct. at 2402.

The record is conflicting on whether the FBI report on the results of the paraffin test was turned over to the appellant's trial attorneys. This Court is hard pressed to find error, in light of Ms. Hickman's testimony that the FBI report was given to defense counsel, and the fact that defense counsel was made aware of the existence of the paraffin test during trial, at a time when such test results could have been requested if they had not previously been disclosed. Considering the fact that the existence of the paraffin test was revealed during trial, we are not persuaded that the disclosure of the evidence came so late as to prevent the defendant from receiving a fair trial. See *United States v. George*, 778 F.2d. 556, 561 (10th Cir. 1985). In any event, having reviewed the record evidence presented against the appellant, in view of the fact that appellant's coun-

sel became aware of the test during trial, we cannot say that the omitted evidence created a reasonable doubt that did not otherwise exist. *Agurs*, 427 U.S. at 112, 96 S.Ct. 2402. See also *United States v. Bagley*, 473 U.S. —, —, 105 S.Ct. 3375, 3384, 87 L.Ed.2d 481 (1985). This assignment of error is without merit.

B.

Appellant argues in his second assignment of error that the trial court erred in admitting evidence of other crimes, wrongs or acts. See 12 O.S. 1981, § 2404(B). He complains about questions directed to him on cross-examination concerning whether he had deserted from the military, and whether he had harmed or threatened to harm anybody. He also complains about rebuttal testimony by Max McElroy and Carl Nichols. In the absence of a timely specific objection, however, these contentions have not been properly preserved for appellate review. See 12 O.S. 1981, § 2104(A)(1); *Ross v. State*, 717 P.2d 117, 121 (Okla. Crim. App. 1986). Appellant further complains about the admission of testimony by the decedent's two children concerning the appellant's pointing a gun at the deceased during an argument. Only one of these two instances was preserved for review by a timely specific objection. We find that such evidence was probative of appellant's motive and/or intent. See 12 O.S. 1981, § 2404(B). Accordingly, we find no error.

C.

In his fourth assignment of error, appellant complains that he was deprived of a fair and impartial jury by the exclusion of prospective jurors who were opposed to capital punishment. This Court has adopted the United States Supreme Court's recent decision in *Lockhart v. McCree*, 476 U.S. —, —, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986), which rejected such a position. See *VanWoundenberg v. State*, 720 P.2d 328, 331-32 (Okla. Crim. App. 1986), cert. denied, — U.S. —, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986). Accordingly, this assignment of error is without merit.

D.

In his fifth assignment of error, appellant asserts that he was denied access to an independent psychiatrist in violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). We disagree. On September 14, 1984, upon application by defense counsel, the trial court ordered the appellant to be admitted to Eastern State Hospital in Vinita for a competency examination. Appellant was determined to be competent to stand trial. Subsequently, the *Ake* decision was decided on February 26, 1985, and that same day defense counsel filed a motion for funds for a psychiatric examination. On March 4, 1985, a hearing was held and defense counsel was directed by the trial judge to prepare a proper order to request a psychiatrist at Eastern State Hospital to determine the appellant's sanity at the time of the offense, in light of a previous medical report that the appellant had suffered a heart attack near the time of the offense. (March 4, 1985 Motion Tr., at 3-4) The order was issued by the trial judge the same day. (O.R. 33-34) The record of a pretrial hearing held on March 25, 1985, shows that the appellant was provided access to two physicians at Eastern State Hospital, who were made available as defense experts, to assist in consultation, evaluation and preparation of a defense: (1) Dr. Edward K. Norfleet, a staff psychiatrist, and (2) Dr. B.F. Hutchins, a medical doctor. Defense Exhibit No. 2, admitted during the hearing, shows that the cardiogram done on appellant was interpreted by Dr. Conrad, a cardiologist of Tulsa. Near the end of the hearing, defense counsel stated that "I believe I can cure most of this with a hypothetical by telephone or . . . in writing. I believe it will answer our whole problem . . . I will contact Doctor Norfleet . . . [and] . . . if he does not comply with the hypothetical, then we'll come back over here again . . ." (Motion Tr., at 32-33) No other objections were made prior to trial indicating that Dr. Norfleet had not complied with defense counsel's requests.

Dr. Hutchins testified on behalf of the appellant at trial that medical test showed that the appellant had suffered a "recent" heart attack. The appellant's defense theory was that he was

incapacitated by a heart attack at the time the homicide occurred. At trial, appellant did not present any medical testimony that he was insane at the time of the offense, nor did the State introduce psychiatric evidence against him. Even if we were to agree, which we do not, that appellant made the required *ex parte* preliminary showing that his sanity at the time of the offense was to be a significant factor at trial, the record shows that the appellant had access to competent medical personnel to assist in the preparation, evaluation and presentation of his defense. On this record, we conclude that appellant received the "basic tools" of an adequate defense within the meaning of *Ake*. See *Standridge v. State*, 701 P.2d 761, 764 (Okla. Crim. App. 1985). This assignment is without merit.

II

ISSUES RELATING TO PUNISHMENT

A.

Recently, in *Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987)(Opinion on Rehearing), this Court agreed with the Tenth Circuit's conclusion in *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987), that this Court's past construction of the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. In *Stouffer*, we held that this aggravating circumstance is applicable only where there is evidence that the death of the murder victim was preceded by torture or serious physical abuse. *Stouffer*, 742 P.2d at 563. This Court held that "in the absence of evidence of physical or mental suffering, the aggravating circumstance that it was heinous, atrocious, or cruel was not supportable." *Id.* at 564 (citing *Odum v. State*, 651 P.2d 703 (Okla. Crim. App. 1982)). We find that the same is true here. Accordingly, we turn to the issue of the sufficiency of the evidence to support this sole aggravating circumstance.

Dr. Murlyn Bellamy, a forensic pathologist, testified that the victim died from multiple gunshot wounds. Dr. Bellamy stated

that he found seven entry wounds, with one of the shots going through the heart and another going through the aorta. Either of these two shots, according to Bellamy, could have been fatal, and a person with such wounds would have survived "a few minutes at the most." Although Detective Scott was permitted to relate his theory that the appellant shot the victim several times before her car ran off the road, and that he shot her four more times after her car ran off the road into a tree, the evidence presented at trial simply did not establish when the two fatal shots were inflicted. After carefully reviewing the record, we cannot say the evidence presented by the State was sufficient to establish the requisite torture or serious physical abuse necessary to sustain the heinous, atrocious or cruel aggravating circumstance under 21 O.S. 1981, § 701.12(4), beyond a reasonable doubt as required by 21 O.S. 1981, § 701.11. See *Stouffer*, *supra*; *Odum v. State*, 651 P.2d 703, 707 (Okla. Crim. App. 1982). This was the sole aggravating circumstance contained in the Bill of Particulars required by 21 O.S. 1981, § 701.10, and found to exist by the jury under 21 O.S. 1981, § 701.11, and therefore, the sentence of death must be set aside and modified to life imprisonment.

B.

Finally, we wish to express our extreme disapproval of the prosecutor's argument during the second stage, in which he asked the jury "to call Kay Brown back from the grave, put her on the stand under oath" and that, if asked, she would say "yes, I think it was heinous, yes, I think it was cruel, yes, I think it was atrocious." The prosecutor continued: "I dare say that Kay would say 'it was not a pleasant experience and I was going through torture during that few minutes as I was laying there dying . . .'" Defense counsel's objections to the argument were overruled. As this Court stated in *Tobler v. State*, 688 P.2d 350, 354 (Okla. Crim. App. 1984), it is improper for the prosecution to make pleas to the jury for sympathy for the victim. Further, such comments are contrary to the *ABA Standards for Criminal Justice*, § 3-5.8(c) (1980), which expressly

forbid arguments "calculated to inflame the passions or prejudices of the jury." The prosecutor improperly went outside the record by speculating on what was going through the victim's mind at the time of the shooting. *See Thompson v. State*, 462 P.2d 299, 304-05 (Okla. Crim. App. 1969). Additionally, the prosecutor improperly gave his personal opinion that this case called for the death penalty. *See Young v. State*, 695 P.2d 868, 869 (Okla. Crim. App. 1985)("[T]he prosecutor is allowed to draw logical inferences and state his conclusions based upon the evidence, but it is improper for him to state his personal opinion."). Trial judges have an affirmative obligation "to ensure that final argument to the jury is kept within proper, accepted bounds." *ABA Standards, supra*, § 3-5.8(e). We find that the improper comments during the second stage further supports our decision to modify the appellant's sentence to life imprisonment, based on our statutory duty under 21 O.S. Supp. 1986, § 701.13(C)(1), to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

For all of the foregoing reasons, the sentence of death is vacated and hereby MODIFIED to life imprisonment and, as modified, the judgment and sentence is otherwise AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY THE HONORABLE STEVEN W. TAYLOR, DISTRICT JUDGE

RALPH L. BROWN, appellant, was convicted of First Degree Murder in Pittsburg County District Court, Case No. CRF-85-424, sentenced to death, and appeals. AFFIRMED as MODIFIED to life imprisonment.

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Opinion by: Parks, J.
Brett, P.J.: Concurs
Bussey, J.: Specially Concurs

BUSSEY, J., SPECIALLY CONCURRING

I agree that the conviction must stand and that the sentence should be modified to life.

As I read the record, a jury could have found that the victim's death was preceded by serious physical abuse. Testimony reconstructing the murder scene showed that the victim was shot, lost control of her vehicle, ran into a tree, attempted to escape her assailant, and was shot four more times inside the car. As least one time, she was shielding herself from gunfire. Any conflicting testimony presented a question of fact for the jury and their determination should not be disturbed. I cannot agree that being shot, chased down, and shot again does not constitute serious physical abuse preceding death. The evidence adequately supports the aggravating circumstance of heinous, atrocious, or cruel.

However, I must concur in results, since the prosecutor did engage in improper closing argument during the second stage by injecting his personal opinion as to the propriety of the death sentence. Specifically, he stated:

"Ladies and gentlemen of the Jury, it's not an easy decision that Mr. Whittington and I must ask when we seek the death penalty. We have to search our conscience before we can ever ask you. This case, in my opinion, calls for the death penalty, because of the very nature of the way it was. Ralph Brown did not shoot her seven times. He pumped seven bullets into her body intentionally. For that, I think he should receive the ultimate punishment."

This statement, coupled with other remarks noted in the majority opinion, created sufficient prejudice that the sentence of death must be set aside.

At the time of the conviction in this case, a remand for resentencing was not possible under the law. Therefore, the death penalty must be set aside and the sentence modified to life imprisonment.

No. 87-519

Supreme Court, U.S.

FILED

APR 8 1988

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT H. HENRY
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IN THE
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Respondent.

PETITIONERS' REPLY BRIEF

RESPONSE TO RESPONDENT'S COUNTER
STATEMENT OF CASE

A. Guilt-Innocence Proceeding

Although Respondent, hereinafter referred to as the "Defendant", contended that he was fired by the Riddles in January, 1982, Charma Riddle testified that Defendant was laid off from the Riddles' remodeling business

in December, 1981, due to lack of work and defendant moved to Nevada (Tr. 382; 394).

Circumstantial evidence established that the Defendant was in the Riddle home on May 4, 1982, prior to their arrival; the Riddles were away until 5:30-6:00 p.m.; at 11:13 a.m. a phone call to the Defendant's girlfriend was placed from the Riddle residence (Tr. 384-86).

Importantly, the Defendant did not turn himself immediately upon completion of his crimes as did defendant in Godfrey v. Georgia, 446 US 420, 425 (1980). He was observed standing in front of the Riddles' GMC Jimmy vehicle as the first police officer arrived at the scene in response to Charma Riddle's call for

help. The Defendant fled the scene, called his sister two days later and requested that she come get him. His sister's husband testified that they agreed to pick up the Defendant only if he would turn himself in to police (Tr. 192093; 438-39).

B. En Banc Opinion of the Tenth
Circuit Court of Appeals

In addition to reversing the United States District Court's denial of the Defendant's petition for a writ of habeas corpus as to his death sentence, the Tenth Circuit reversed its own three-judge panel decision affirming the denial of that relief. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

C. Subsequent Developments in
Oklahoma Law

Petitioners submit that the opinion of the Oklahoma Court of Criminal Appeals in Stouffer v. State, 742 P.2d 562, 563 (Okla. Crim. App. 1987) (on rehearing) is a response to the Tenth Circuit's en banc ruling to comply with the law as interpreted, and to overcome the difficulty it has been having in achieving successful review of Oklahoma capital sentences by the Tenth Circuit.

The existence of other statutory aggravating circumstance establishes that the class of persons eligible for the death penalty has been sufficiently narrowed in accordance with constitutional demands. See Part II, Brief of Petitioners. Furthermore, under the post-Cartwright approach of the

Oklahoma Court of Criminal Appeals, that court has reweighed circumstances and affirmed a death sentence in which only one statutory aggravating circumstance apart from an invalid especially heinous, atrocious or cruel circumstance was found. Castro v. State, 745 P.2d 394 (Okla. Crim. App. 1987), on rehearing ___ P.2d ___, 59 O.B.A.J. 355 (Okla. Crim. App. Nov. 24, 1987). Thus, it is appropriate to discuss the existence of the other statutory aggravating circumstance that was found by the sentence.

The Defendant asserts that Oklahoma does not attempt to establish that this particular statutory aggravating circumstance "has been narrowed by judicial construction as required by Godfrey ." The Defendant's

brief at 11. The plurality in Godfrey never explicitly held that serious physical abuse was a requirement for finding a murder to be "outrageously or wantonly vile, horrible and inhuman." Unlike the present case, in Godfrey: 1) only the statutory language was given to the jury by instruction; 2) only one statutory aggravating circumstance was found; and 3) the Georgia Supreme Court had never reversed a finding of the circumstance.

In the present case, the jury was given the definitional instructions of State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) to which reference was made in Proffitt v. Florida, 428 U.S. 242 (1976). A second aggravating circumstance was found, that the defendant knowingly created a great

risk of death to more than one person. And, the Oklahoma Court of Criminal Appeals previously had invalidated a finding of the circumstance on appeal. Odum v. State, 651 P.2d 703 (Okla. Crim. App. 1982). Thus, Oklahoma submits that Godfrey is not controlling herein.

In addressing the limitations of the especially heinous, atrocious or cruel aggravating circumstance, Oklahoma contends that the Oklahoma circumstance and the Georgia (b)(7) circumstance challenged in Godfrey are "virtual equivalent[s]." Defendant's brief at 15. The Georgia circumstance, however, contains no limiting terms within its statutory language as does the Oklahoma circumstance. Oklahoma submits that, just as the adjective

"mere" validates an anti-sympathy instruction, see California v. Brown, 107 S.Ct. 837, 840, 843 (1987), the term "especially" narrows the class of persons eligible for a finding of the "especially heinous, atrocious or cruel" circumstance.

The Defendant failed to challenge Oklahoma's assertion that reliance upon such factors as the killer's attitude and the manner of the killing are no more "subjective" than a finding of future dangerousness and reliance upon a non-statutory aggravating circumstance, which have been approved by this Court, as was discussed in Part I B of Petitioners' brief. Thus, Petitioners submit that the Defendant concedes the validity of this issue.

Regardless of the permissibility of subjectivity in sentencing, the Defendant is within the class of persons eligible for the death sentence as he knowingly created a great risk of death to more than one person. See Lowenfield v. Phelps, 108 S.Ct. 546 (1988).

REPLY TO SUPPLEMENTAL BRIEF

The Defendant cites to the recent opinion of the Oklahoma Court of Criminal Appeals in Brown v. State, ___P.2d___, 59 O.B.A.J. 893, 896 (Okla. Crim. App. March 23, 1988) as recognition by that court that it previously had interpreted the "especially heinous, atrocious or cruel" aggravating circumstance contrary to constitutional standards.

Oklahoma submits that jurisdiction for resolving the constitutionality of the "especially heinous, atrocious or cruel" circumstance as previously interpreted continues to remain a question for this Court's resolution because both the decision of the Tenth Circuit and the Oklahoma Court of Criminal Appeals' change in interpretation rest upon federal constitutional standards. See Michigan v. Long, 463 U.S. 1032, 1040-42 (1983). As well resolution of this issue by this Court is important to create some uniformity in interpretation among the States employing this aggravating circumstance or its functional equivalent which does not presently exist, see Rosen, The "Especially Heinous" Aggravating Circumstance in

Capital Cases - The Standardless
Standard, 64 N.C.L. Rev. 941 (1986).

CONCLUSION

The judgment of the United States
Court of Appeals for the Tenth Circuit
should be reversed.

Respectfully submitted,

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No. 87-519

IN THE SUPREME COURT OF THE
UNITED STATES, OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF AMICI CURIAE*
ALABAMA, ARIZONA, COLORADO, IDAHO,
LOUISIANA, MISSISSIPPI, MISSOURI,
NEVADA, NEW HAMPSHIRE, NORTH CAROLINA,
SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA,
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No. 87-519

IN THE SUPREME
COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL
OF THE STATE OF OKLAHOMA,

Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

BRIEF OF AMICI CURIAE
IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE . . . . .	1

The amici curiae are states that have an interest in the issue of construction of the aggravating circumstance in a capital murder case that the murder was especially heinous, atrocious or cruel.¹

¹ Eight states employ the language that the offense was
(continued...)

The amici submit this brief through their Attorneys General pursuant to Sup.Ct.R. 36.4. This brief is presented in support of the

¹(...continued)
"especially heinous, atrocious, or cruel." Ala. Code § 13A-5-49(8) (1978 & Supp. 1987); Fla. Stat. § 921.141(5)(h)(1983); La. Code Crim. Proc. Ann. art. 905.4(A)(7)(West 1987); Miss. Code Ann. § 99-19-101(5)(h)(Supp. 1987);¹ N.H. Rev. Stat. Ann. § 630.5(II)(a)(7) (Supp. 1987); N.C. Gen. Stat. § 15A-2000(e)(9) (1981); Okla. Stat. Ann. tit. 21, § 701.12(4) (West Supp. 1987); Wyo. Stat. § 6-2-102(h)(vii)(1983). Sixteen other states may not employ the terminology "especially, heinous, atrocious or cruel", although the import of the circumstance is the same. See e.g., Ariz. Rev. Stat. Ann. § 13-703(F)(6)(1978 & Supp. 1987); Cal. Penal Code § 190.2(a)(14)(West Supp. 1987); Del. Code Ann., tit. 11, § 4209(e)(1)(1)(Supp. 1987); Ga. Code Ann. § 17-10-30(b)(7)(1982); Ill. Ann. Stat. ch. 38, § 9-1(b)(7)(Smith-Hurd Supp. 1987); Idaho Code § 19-2515(f)(5)(1979 & Supp. 1987); Neb. Rev. Stat. § 29-2523(1)(d)(1979); Nev. Rev. Stat. § 200.033(8)(1985); Tenn. Code Ann. § 39-2-203(1)(5)(1982); Utah Code Ann. § 76-5-202(1)(q)(Supp. 1987).

Petitioners Gary D. Maynard and the Attorney General of the State of Oklahoma.

PROPOSITION

THE SENTENCER'S DISCRETION WAS ADEQUATELY CHANNELLED WHERE THE STATE APPELLATE COURT SET GUIDELINES FOR A REVIEW OF THE SUFFICIENCY OF THE EVIDENCE OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE; SUBJECTIVITY IN SENTENCING IS NOT UNCONSTITUTIONAL.

The Petitioners contend that the Oklahoma Court of Criminal Appeals has not interpreted the "especially heinous, atrocious or cruel" aggravating circumstance in capital cases in an unconstitutionally overbroad or vague manner. Oklahoma allows the sentencer to consider the attitude of the killer, the manner of the killing or the suffering of the victim to support this circumstance.

2

Thus, guidelines are provided for a disjunctive interpretation of the terms "heinous", "atrocious", and "cruel", terms of which only the latter is descriptive of the victim's suffering (See definitions, J.A. 12).

The amici contend that the state should be left free to determine what particular guidelines control its own interpretation of that circumstance so long as it can be established that sufficient evidence sets apart a particular murder in which this circumstance is found to exist from other less outrageous murders. The circumstance is not per se violative of the United States Constitution. Gregg v. Georgia, 428 U.S. 153, 201 (1976); Proffitt v. Florida, 428 U.S. 242, 255-56 (1976).

The various states employing this particular circumstance have developed divergent interpretations of the circumstance, all of which constitutionally focus upon the depravity of mind of the killer or the suffering of the victim.² For example, in Woratzeck v. Ricketts, 820 F.2d 1450, 1458 (9th Cir. 1987) a panel of the United States Court of Appeals for the Ninth Circuit has acknowledged the Arizona Supreme Court's definitions of the terms within this circumstance:

The Arizona Supreme Court has defined "cruel" as disposed to inflict pain in an especially

² Some states interpret torturous conduct to include psychological torture. See e.g., Francois v. Wainwright, 741 F.2d 1275, 1286-87 (11th Cir. 1987)(Florida); Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir. 1987) (Mississippi). State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (N.C. 1983).

wanton, insensate, sadistic, or vindictive manner; "heinous" as shockingly evil or grossly bad; and "depraved" as marked by corruption, perversion, or deterioration. See, State v. Richmond, 136 Ariz. 312, 319, 666 P.2d 57, 64, cert. denied, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983).

820 F.2d at 1458. That court upheld the state appellate court's determination of the existence of the circumstance, limiting its own review to a presumption of correctness by the state appellate court's finding unless not fairly supported by the record. Id. See, Sumner v. Mata, 449 U.S. 539, 549-50 (1981). The state court had specifically found that the defendant's violence reflected a heinous and depraved attitude.

Another panel of the Ninth Circuit shortly thereafter refused to accord such deference to the Arizona Supreme

Court interpretation of the circumstance. In Jeffers v. Ricketts, 832 F.2d 476, 482-86 (9th Cir. 1987), the court held that the standard of heinousness and depravity could not be applied in a principled manner to the defendant in that case, and struck down the death sentence as arbitrary. Id. at 485. That panel reached that conclusion despite acknowledgement that the Arizona Supreme Court had set forth five factors that lead to a finding of heinousness or depravity; (1) a relishing of the murder by the killer; (2) gratuitous violence against the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; and (5) helplessness of the victim; and had found the circumstance to exist in that case.

Amici contend that deference by federal courts to state court interpretations is appropriate where, as in Oklahoma and Arizona, the state appellate courts have fashioned standards for review of the circumstance.

The purpose of providing aggravating circumstances is to give guidance to a sentencer when imposing the death sentence rather than to give federal courts supervisory review over whether state courts are appropriately evaluating and quantifying the death penalties imposed in their jurisdictions. Cf. Pulley v. Harris, 465 U.S. 37 (1984) (states are not required to conduct a proportionality review of the death sentences imposed).

The State's power upon appellate review to determine the sufficiency of evidence regarding the existence of a particular aggravating circumstance, see e.g., Okla. Stat. Ann. Tit. 21 § 701.13(C)(2) (West Supp. 1988), should not be limited by federal courts. In Patterson v. New York, 432 U.S. 197, 201 (1977), the Court noted:

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

Just as this Court has ruled that review of a criminal defendant's guilt is limited to consideration whether a rational factfinder could have found the defendant guilty beyond a

reasonable doubt, see Jackson v. Virginia, 443 U.S. 307, 324 (1979), amici submit that federal review of an aggravating circumstance is similarly limited. Cf. California v. Ramos, 463 U.S. 992, 1001 (1983) (deference given to State's choice of substantive factors relevant to penalty assessment).

In Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987) (on rehearing en banc) and Jeffers v. Ricketts, 832 F.2d at 484-85, the federal courts have sought to excise any subjectivity from the factfinder's discretion by mandating that completely objective factors be employed in determining the existence of an aggravating circumstance.

Amici contend that elimination of all subjectivity is not constitutionally required to validate a death sentence. Subjectivity is inherent in a factfinder's decision-making. See Jackson v. Virginia, 443 U.S. at 331 n.2. This Court has virtually mandated subjectivity in the context of a capital sentencing determination by its ruling regarding consideration of evidence in mitigation in Skipper v. South Carolina, 476 U.S. 1, 4 (1987).

Amici contend that continued reliance upon an interpretation of Godfrey v. Georgia, 446 U.S. 420 (1980), that the especially heinous, atrocious or cruel aggravating circumstance is proper only upon an objective showing of torture or

physical abuse improperly restricts the factfinder and state appellate courts from consideration of all the relevant evidence in aggravation. Limitation of this circumstance to pre-mortem suffering by the actual murder victims could result in an unjust sentence. For example, should a depraved killer place a bomb on a school bus to cause emotional trauma to the loved ones of the children on board, and that bomb kill instantly all those on the bus, Godfrey would mandate rejection of a finding that the murders were especially heinous, atrocious or cruel.

In Petitioner's case, it cannot be said that the killer's depraved attitude was not evidenced by sufficient evidence as determined by the Oklahoma Court of Criminal Appeals - he

expressed his desire for revenge for having been laid off from employment by the murder and shooting victims, Mr. and Mrs. Riddle; he lay in wait for them or returned to the home under cover of darkness; he viciously attempted to kill Charma Riddle as well as successfully killed Hugh Riddle; and he engaged in efforts to conceal his deeds. Cartwright v. State, 695 P.2d 548, 554-55 (Okla. Crim. App. 1985).

Amici contend it is untenable to conclude that Hugh Riddle's murder should not be set apart from other murders simply because the evidence does not support a conclusion that Hugh Riddle lingered in pain before he died. Evidence of respondent's depraved mind was present throughout the entire criminal episode. It indeed seems more

arbitrary to require objective evidence of physical pain before allowing the existence of this circumstance than to allow subjectivity to play a role in evaluating the circumstance.

The appellate courts of Oklahoma and Arizona have rejected a finding of the circumstance in appropriate instances under evidence particular to the cases being reviewed. See, Odum v. State, 651 P.2d 703, 707 (Okla. Crim. App. 1982); State v. Graham, 135 Ariz. 209, 660 P.2d 460, 463 (1983).

Because concepts of federalism and subjectivity in sentencing are applicable to trials for capital offenses, this Court should rule that the Tenth Circuit Court of Appeals exceeded the bounds of its review of Respondent's sentence and that the

interpretation of the especially heinous, atrocious or cruel circumstance by the Oklahoma Court of Criminal Appeals was adequately channelled, particularly when another statutory aggravating circumstance was found.

CONCLUSION

For the reasons stated, the amici respectfully request that the decision of the United States Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted,

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MOTION FILED

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NO. 87-519

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

GARY D. MAYNARD, Petitioner

v.

WILLIAM THOMAS CARTWRIGHT,
Respondent

ROGER DALE HAYES, Amicus Curiae

ON WRIT OF HABEAS CORPUS TO THE COURT OF
CRIMINAL APPEALS OF OHIO

NOTICE FOR PERMISSION TO FILE
BRIEF AMICUS CURIAE

AND

BRIEF AMICUS CURIAE ON BEHALF OF
ROGER DALE HAYES
IN SUPPORT OF RESPONDENT
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March 11, 1937

NO. 87-519

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GARY D. MAYNARD, Petitioner

V.

WILLIAM THOMAS CARTWRIGHT,
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ROGER DALE HAYES, Amicus Curiae

ON WRIT OF CERTIORARI TO THE COURT OF
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IN SUPPORT OF RESPONDENT
WILLIAM THOMAS CARTWRIGHT

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No. 87-519

SUPREME COURT OF THE UNITED STATES

GARY D. MAYNARD, Petitioner

v.

WILLIAM T. CARTWRIGHT, Respondent

MOTION FOR PERMISSION TO FILE BRIEF
AMICUS CURIAE SUPPORTING RESPONDENT

Roger Dale Hayes respectfully requests permission to file the attached brief amicus curiae in the above-captioned case. He has received written permission of petitioner, representing the state of Oklahoma, to file this brief, a copy of which is being lodged with the Clerk of this Court. Respondent has refused permission.

INTEREST OF AMICUS

Roger Dale Hayes, amicus curiae, stands condemned to death for first degree murder in the state of Oklahoma. His

Petition for a Writ of Certiorari to this Court is currently pending in Hayes v. Oklahoma, No. 87-5676. Mr. Hayes' case raises essentially the same question as this case, the constitutionality of Oklahoma's application of the so-called "heinous, atrocious, or cruel" aggravating circumstance in the definition of those murders to be punished by death.

Mr. Hayes wishes to present arguments supporting respondent Cartwright's position in this case which are subsumed in the question presented by both petitioner and respondent. The focus of his argument will be upon whether it comports with due process to execute persons who had no notice of what would be considered "heinous, atrocious, or cruel" under state law at the time they allegedly committed their crimes. Given the briefing history of this case in the court below, under-

signed counsel believes that the focus of this argument will be somewhat different than that the parties have presented, in that the parties have not focused upon what knowledge was available to the general citizenry at the time of the crimes alleged.

This matter presents an alternate ground for affirmance of the judgment of the Tenth Circuit, and need not be considered if the Court finds Respondent's arguments persuasive.

The situation of amicus is probably typical of many death row inmates in many states, who are alleged to have committed their crimes between the time that the Legislature enacted the "heinous, atrocious, or cruel" aggravating circumstance and the time that the statute was given any definite, constitutionally limited interpretation by the Courts, pursuant to

cases such as Godfrey v. Georgia, 446 U.S.
420 (1980).

CONCLUSION

As someone whose life is at stake upon
the issue raised in this case, it is just
and equitable that the views of Roger Dale
Hayes be heard thereon.

Respectfully submitted,

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No. 87-519

SUPREME COURT OF THE UNITED STATES

GARY D. MAYNARD, Petitioner

V.

WILLIAM T. CARTWRIGHT, Respondent

BRIEF AMICUS CURIAE OF ROGER DALE HAYES

IN SUPPORT OF RESPONDENT

SUMMARY OF ARGUMENT

The matter presented in this brief is solely an alternate ground for affirmance of the judgment of the Tenth Circuit, and need not be reached if the reasons for affirmance advanced by Respondent are accepted.

The execution of respondent William T. Cartwright, and by extension of amicus curiae Roger Dale Hayes, would violate the Due Process Clause of the Fourteenth Amendment, specifically the ex post facto-

type principles embodied therein. See Marks v. United States, 430 U.S. 188 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964). Failure of the Court of Criminal Appeals to provide a constitutionally limited definition of the statutory "heinous, atrocious, or cruel" aggravating circumstance at the time these crimes occurred deprived respondent and amicus of fair warning of what acts might be punishable by death thereunder.

ARGUMENT

A. INTRODUCTION

The reason for affirmance of the judgment of the Tenth Circuit presented herein is an alternate ground to those presented by Respondent William Thomas Cartwright. It need not be considered or address if the reasons presented by Respondent, which amicus Roger Dale Hayes joins, are accepted. It is presented because the Court below may be affirmed for any reason fairly comprehended within the question presented by the case.

Amicus Roger Dale Hayes agrees with the position of Respondent, William Thomas Cartwright, in his Brief in Opposition to Certiorari, at 4, and which he expects Respondent to continue to maintain, that the Tenth Circuit in this case "faithfully follow[ed] the fundamental constitutional principles established by this Court in

Godfrey v. Georgia, 446 U.S. 420 (1980). .
.." This being the case, it is straight-
forward for this Court to affirm the
judgment of the Tenth Circuit under
existing caselaw.

Indeed, the brief of Petitioners,
representing the state of Oklahoma,
appears to admit that the Oklahoma courts
have not been complying with Godfrey.
Their brief consists principally of an
attack on the vitality of the Godfrey
holding that states must provide "a
principled way to distinguish [those
cases] in which the death penalty was
imposed, from the many cases in which it
was not." Id. at 433. See Brief of
Petitioners at 55 (argument I-A), 56-78
(argument I-B). Amicus would join in what
he expects will be Respondent's arguments
demonstrating the continuing vitality of
Godfrey. This is even a narrower basis

for the decision of this Court.

B. A CAPITAL DEFENDANT IS DENIED DUE PROCESS UNDER EX POST FACTO-TYPE PRINCIPLES WHERE THE STATE LAW STANDARD DEFINING WHAT ACTS WILL BE PUNISHABLE BY DEATH IS NOT SET FORTH UNTIL AFTER DEFENDANT'S ALLEGED CRIME IS COMPLETE.

On December 14, 1980, amicus curiae Roger Dale Hayes allegedly committed a murder. The Oklahoma Courts have condemned him to death on the ground that the crime was "especially heinous, atrocious, or cruel" under 21 Okla. Stat. sec. 701.12 (4). On May 14, 1982, respondent William T. Cartwright allegedly committed the crime for which he is condemned under the same statutory provision. At the time of these alleged crimes, there was no constitutionally limited definition of "heinous, atrocious or cruel" in effect in Oklahoma which could have been applicable to these cases. See Godfrey v. Georgia,

446 U.S.420 (1980) (plurality and concurring opinions) ("heinous, atrocious, or cruel" without limiting construction is too vague a standard on which to base a sentence of death); Eddings v. Oklahoma, 455 U.S. 104, 109 n.4 (1982) (Oklahoma law applied "heinous, atrocious, or cruel" to killing of police officer).

Because there was no such applicable limiting definition, amicus and respondent could have had no fair notice concerning what would be punishable by death under this provision. Without fair notice, execution of amicus or respondent would violate fundamental principles of due process analogous to the principles enunciated in the Ex Post Facto Clause.¹

¹ This argument is fairly subsumed within the due process issues raised by petitioner and respondent. If the Court believes it is outside that issue, then the Court should grant certiorari in Hayes v. Oklahoma, No. 87-5676, to address the

U.S. Const., art I, sec. 10; id., amend. XIV, sec. 1.

Fair notice of what acts will be subject to punishment, and in what amount, is "fundamental to our concept of constitutional liberty." Marks v. United States, 430 U.S. 188, 191 (1977); see Miller v. Florida, 107 S.Ct. 2446 (1987) (changes in sentencing guidelines covered by Ex Post Facto Clause even if definition of and maximum penalty for crime unchanged); compare Dobbert v. Florida, 432 U.S. 282, 297-98 (1977) (statute later declared unconstitutional because of its procedural provisions may provide fair notice of what conduct will be sanctioned by death). As this Court said in Godfrey, 446 U.S. at 428:

Part of a State's responsibility . . .
is to define the crimes for which

argument.

death may be the sentence in a way that obviates "standardless [sentencing] discretion."

Judicial constructions which unforseeably modify or expand criminal liability may not be applied to conduct occurring before they were announced, the same way that statutes creating crimes or increasing punishments may not be retroactively applied. Marks v. United States, supra at 191-92; Bouie v. City of Columbia, 378 U.S. 347 (1964); see Rabe v. Washington, 405 U.S. 313 (1972). Because "fair warning of that conduct which will give rise to criminal penalties . . . is fundamental," 430 U.S. at 191, cases such as Marks and Bouie have imported ex post facto principles into the Due Process Clause, despite earlier cases which held that the literal text of the Ex Post Facto Clause applies only to legislative enactments. E.g., Frank v. Magnum, 237

U.S. 309, 344 (1915).

What has happened both to amicus Hayes and respondent Cartwright is the sort of action condemned in Marks, Bouie, Rabe, and the host of Ex Post Facto Clause cases. Hayes and Cartwright have been condemned to death on the basis of a definition of capital offenses which could not have been clear to the citizenry at the time of their alleged crimes. Indeed, in the case of amicus Hayes, the State admits the Oklahoma rule was "determined" under state law years after Hayes' (and Cartwright's) alleged crimes.²

² In its Response to Petition for writ of Certiorari, at 6, in Roger Dale Hayes v. Oklahoma, No. 87-5676 (dated November 12, 1987, the state of Oklahoma points out:

[A]fter the decision in [State v. Roger Dale Hayes, 1987] was issued by the Court of Criminal Appeals that Court in Stouffer v. State, 738 P.2d 1349 (Okla. Cr. 1987) on rehearing, 58 Okla. Bar. J. 2352 [742 P.2d 652]

Where a statute is unclear, it does not provide fair warning concerning what acts it penalizes, or with what penalties. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Bouie v. City of Columbia, 378 U.S. 347, 351 (1964), quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

Lanzetta was a case remarkably like those of respondent and amicus. Lanzetta

(Oklahoma Crim. App. July 31, 1987)[,] determined that the aggravating circumstance of heinous, atrocious or cruel would be limited to those situations where the evidence showed there was torture or serious physical abuse of the victim.

Whether or not Stouffer "determin[es]" a state law definition of "heinous, atrocious, or cruel" which is constitutional is unimportant. What is significant is the implicit admission that one needs to apply a 1987 determination to crimes which happened between five and seven years before it was made. What could be more ex post facto?

was convicted of being a "gangster." The state statute defining "gang" and "gangster" was, on its face, impermissably vague. See 306 U.S. at 453-55, 458. The more definite state law construction of "gangster" under which New Jersey sought to uphold Lanzetta's conviction was not made until after Lanzetta's alleged crime and his trial. 306 U.S. at 456. This Court prohibited the use of the later construction:

It would be hard to hold that, in advance of judicial utterance upon the subject, they [the defendants] were bound to understand the challenged provision according to the language later used by the court.

306 U.S. at 456.

That is exactly the case here. Neither amicus Hayes (in 1980) nor respondent Cartwright (in 1982) could be bound to understand the definition of "heinous, atrocious or cruel" to be

anything more definite or clear than the law as expounded to those points. They may not be required, at peril of their very lives, to "speculate" as to the meaning of this penal statute. By contrast, in Dobbert v. Florida, supra, this Court considered no claim that a new death penalty statute changed the law concerning which murders are substantively worthy of the death penalty. Thus there was no claim that the application of the new death penalty law had forced petitioner to speculate as to whether his crime would be considered worthy of death.³

Miller v. Florida, supra, is another

³ Dobbert held the application of new procedures in state statutes did not violate the Ex Post Facto clause. None of the changes addressed by the Court, however, involved a claim that the substantive definition of the crimes to which the death penalty would apply had changed.

analogous case. The Court there held that increases in presumptive sentencing guidelines could not be applied to a sexual battery committed prior to the changes, even though the maximum sentence for the crime had not changed. The Court held unanimously that the only notice of potential penalties for sexual battery that a citizen has are the statements of the maximum penalty and sentencing guidelines in force at the time the crime is committed. The Court held that a statutory provision allowing a Commission to change sentencing guidelines could not provide a citizen notice that changes would actually be made or what those changes would be, and thus could not be a basis for applying the new guidelines.

The situations of Hayes and Cartwright are similar to Miller's. By being subject to an unpredictable ex post facto "clari-

fication" of the "heinous, atrocious or cruel" aggravating circumstance, their alleged acts are subject to being brought into the class of acts subject to death, without any warning whatsoever to them. Not knowing what specific, narrowed definition of "heinous, atrocious, or cruel," marking the boundary between life and death, will apply to each of them is similar to not knowing what set of sentencing guidelines would apply to Miller. Each party is required, as Lanzetta says, to "speculate" concerning the criminal consequences of his actions.

Examination of state law at the time of the two crimes alleged in respondent's and amicus' cases reveals that there was no clear definition from which a person of ordinary intelligence could determine what murders would be considered especially heinous, atrocious or cruel. Indeed,

petitioners' entire principal brief is nearly an admission that Oklahoma has not been applying a definition that comports with Godfrey.⁴

The first Oklahoma case to consider the definition of "heinous, atrocious or cruel" in 21 Okla. Stat. sec. 701.12 was Eddings v. State, 616 P.2d 1159, 1167-68 (Okla. Crim., March 21, 1980), rev'd, 455 U.S. 104 (1982). While the reversal was on other grounds, this Court stated its understanding of of the meaning given to "heinous, atrocious or cruel" by the state court under state law:

We understand the Court of Criminal

⁴ In light of the State's view that "heinous, atrocious, or cruel" was given a constitutionally limited definition in 1987 (Response to Petition for Certiorari, Roger Dale Hayes v. Oklahoma, at 6, discussed supra note 2), it should be unnecessary to go any further. Nonetheless, amicus will here discuss the Oklahoma law available at the time of his (and Cartwright's) alleged crime.

Appeals to hold that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel" under the Oklahoma statute.

455 U.S. at 109 n.4.

One cannot reasonably expect ordinary persons to have seen in the obscure state court language of Eddings v. State a different definition of "heinous, atrocious, or cruel" than that perceived by the members of this Court. Dicta in Eddings v. State, 616 P.2d at 1167-68, discusses tortuous or abusive killings. Given that torture or abuse was not involved in that case, this Court, 455 U.S. at 109 n.4, did not read such language as authoritative.

This Court's reading was accurate. A few months after the state court decision in Eddings, the Court of Criminal Appeals had explicitly repudiated a suggestion that that the phrase is aimed "only at the

conscienceless or pitiless crime, which is unnecessarily tor[tuous] to the victim." Irvin v. State, 617 P.2d 588, 598 (Okla. Crim. August 29, 1980). This opinion reopened the definition of "heinous, atrocious, or cruel" in Oklahoma to all the evils of vagueness condemned by this Court in Godfrey v. Georgia, supra.

Thus at the time that amicus Roger Dale Hayes allegedly committed his crime, the notice that he had concerning what would be considered "heinous, atrocious or cruel" might reasonably be described as "less than zero."⁵ He certainly had no notice of any constitutionally limited

⁵ Hays v. State, 617 P.2d 223, 232 (Okla. Crim., Aug. 28, 1980), and Chaney v. State, 612 P.2d 269, 282-83 & n.1 (Okla. Crim., May 15, 1980), cert. denied, 450 U.S. 1025 (1980), involved the "heinous, atrocious, or cruel" aggravating circumstance, but the Court in those cases set out no standard for defining it.

definition of what would be punishable by death--other than shooting a police officer, which he did not do.

The situation was hardly better for respondent Cartwright. Two more cases had been decided, in which the Court of Criminal Appeals had upheld convictions based upon jury instructions very similar to the ones condemned in Godfrey v. Georgia, supra. Jones v. State, 648 P.2d 1251, 1259 (Okla. Crim., July 26, 1982), cert. denied, 459 U.S. 1155 (1983); Burrows v. State, 640 P.2d 533, 542-43 (Okla. Crim., January 20, 1982), cert. denied, 460 U.S. 1011 (1983). The earlier of these cases contains reference to the more specific language set forth in the Court of Criminal Appeals version of Eddings, and both contain reference to specific bloody facts of the cases. Yet neither of them repudiates the holding of

Irvin, which effectively is that almost any murder can be considered "heinous, atrocious, or cruel."

Given the information available to amicus and respondent, there is no basis for concluding that either could have understood what murders would be considered "especially heinous, atrocious, or cruel." Where there is no fair notice of what will be punishable by death, a capital sentence violates due process of law.

Lack of notice is especially clear in the case of amicus Hayes. Even if it should be decided that respondent Cartwright had appropriate notice, this Court should make clear that every other case will depend upon the notice available to the public at the time the alleged crime was committed.

The arguments of petitioner Maynard,

representing the state of Oklahoma, and amici Attorneys General of other states miss the point that due process requires fair notice to the citizenry. They focus solely on whether the statute provides--or needs to provide--adequate direction to sentencers concerning which cases justify a death sentence.⁶ But if, at the time of the crime alleged, a defendant could not

⁶ Petitioner Maynard also misses the point when arguing that this Court should not define "heinous, atrocious or cruel" as requiring torture. Brief of Petitioners at 37-55. Godfrey does not require such a state law definition. It merely provides that the definition must not be vague--it does not compel what the definition must be.

Thus Godfrey and other federal cases cannot be held to have provided respondent Cartwright or amicus Hayes with notice of the state law definition of "heinous, atrocious, or cruel." That is wholly a state law matter. Eddings, by its emphasis upon the fact that the victim was a police officer on duty, provides a much different definition of "heinous, atrocious or cruel" than that suggested by Godfrey or Proffitt v. Florida, 428 U.S. 242 (1976).

have had reasonable notice that it would be punishable by death under this provision, no amount of direction of the sentencer's discretion can make death a conscionable punishment.

CONCLUSION

No one should be required "at peril of life . . . to speculate as to the meaning of penal statutes." Bouie v. City of Columbia, supra. If fair notice is particularly important in First Amendment cases, id; Marks v. United States, supra; it is even more so in capital cases. The purpose of Godfrey, to introduce predictability into the execution of death sentences, is thwarted unless notice is given to the citizenry concerning what types of acts will merit that penalty. Confusion reigning in Oklahoma law at the time of the alleged crimes of amicus and respondent denied them notice that their

alleged crimes would be punished by death. In these circumstances, the state of Oklahoma should not kill Roger Dale Hayes and William Thomas Cartwright.

For this reason, as well as the reasons that respondent Cartwright stated in his Brief in Opposition to Petition for Writ of Certiorari and the reasons the undersigned expects Cartwright to assert in his principal brief, amicus Roger Dale Hayes respectfully requests that the judgment of the Tenth Circuit be affirmed in case no. 87-519. In his own case, No. 87-5676, amicus Hayes respectfully requests that certiorari be granted and the judgment of the Court of Criminal Appeals of Oklahoma be reversed, or the judgment of the Court of Criminal Appeals be vacated and remanded for further consideration in light of the judgment in case no. 87-519.

Respectfully submitted,

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Supreme Court, U.S.

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No. 87-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GARY D. MAYNARD and the
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Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

BRIEF OF AMICUS CURIAE CALIFORNIA APPELLATE PROJECT

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WILLIAM THOMAS CARTWRIGHT,
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**BRIEF OF AMICUS CURIAE
CALIFORNIA APPELLATE PROJECT**

The California Appellate Project submits the attached brief *amicus curiae* in the above-entitled case. The consent to file the brief has been obtained from the attorneys for the parties.

STATEMENT OF INTEREST OF AMICUS CURIAE

The California Appellate Project ("CAP") is a nonprofit corporation established by the State Bar of California to assist the California Supreme Court in recruiting competent appointed counsel for automatic appeals and in insuring that they are providing the quality of representation demanded by those cases. Pursuant to this mandate, CAP provides direct representation to seven capitally sentenced defendants and assists appointed counsel in more than 140 other capital appeals. Because of its extensive involvement in capital cases, CAP is familiar with the issues concerning the "especially heinous, atrocious, or cruel" language as it has appeared in California's death penalty statute.

CAP has recently become aware of statements made in the briefs of Petitioner and of Amici Alabama, et al., characterizing California as a state with a provision in its death penalty law similar to that which is at issue in the present case. CAP believes that this characterization of California law is inaccurate and should be clarified so that the Court's decision in this case will be based on accurate information.

To the best of CAP's knowledge, the Court has not had and will not otherwise receive the benefit of briefing from a litigant directly familiar with California's death penalty statutes. We are therefore asking leave to file the within brief, to ensure that the Court is presented with an accurate characterization of California law.

THE QUESTION OF LAW PRESENTED

Both Petitioner and Amici Alabama, et al. classify California as a state whose capital punishment scheme has a provision "equivalent to," or of the same "import" as, Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. Brief of Petitioner, 34, n. 4, and accompanying text, & Appendix A; Brief of Amici, 2, n. 1. Actually, however, California cannot be grouped with these other states, for at least two reasons.

First, California has not had such a provision in effect since 1982, when the state's supreme court found it unconstitutionally vague under both the state and federal constitutions. *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982).

Second, the overall context in which California's death penalty law employed the "heinous, atrocious, or cruel" language was significantly different from that found in most, if not all, of the other states listed. The California provision authorized the jury at the guilt-phase of a capital trial to find, as a "special circumstance," that "the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity;" the statute specifically defined this latter phrase as "mean[ing] a conscienceless, or pitiless crime which is *unnecessarily torturous to the victim*." Cal. Pen. Code, § 190.2(a)(14) (emphasis added). But the California law also contains a separate "special circumstance" provision that covers the intentional "infliction of torture." Cal. Pen. Code, § 190.2(a)(18). The question then naturally arose: What was the "heinous, atro-

cious, or cruel" special circumstance intended to cover that the "torture" special circumstance does not also cover? In light of the initiative statute's specific definition of "heinous, atrocious, or cruel," it was impossible to tell. See *Engert*, 31 Cal.3d at 802, n. 2¹. Thus, the overall context made the problem of affixing a plausible meaning to California's "heinous, atrocious, or cruel" provision insurmountably problematic.

Indeed, the most plausible purpose of the "heinous, atrocious, or cruel" special circumstance was the patently unconstitutional one of serving as a "catchall" to make every murderer eligible for the death penalty. At the time California's death penalty initiative was submitted to the state's electorate for adoption, the initiative's drafters told the voters that the proposed law would make the death penalty "apply to every murderer." See Official Cal. Voters Pamph., Gen. Election (Nov. 7, 1978) at 34.² The only special circumstance that might have qualified to serve as the catchall needed to satisfy this promise was the "heinous, atrocious, or cruel" special circumstance.

The constitutional problem with the drafters' intentions is obvious. The Constitution requires a death penalty statute to "genuinely narrow the class of persons eligible for the death penalty," *Lowenfield v. Phelps*, — U.S. —, —, 98 L.Ed.2d 568, 581 (1988); the "special circumstance" provisions were designed to fulfill this requirement in California. See *California v. Ramos*, 463 U.S. 992, 1008 (1983); *Pulley v. Harris*, 465 U.S. 37, 53 (1984). Thus, had California's

¹ The problem of trying to define "heinous, atrocious, or cruel" in California was exacerbated because the statutory definition of this special circumstance was phrased in terms of "unnecessary" torture. As the state supreme court noted, "any attempt to determine what constitutes 'necessary' torture — to clarify the meaning of 'unnecessary' — appears to be futile. [The language about] 'unnecessarily' torturous assumes the existence of conduct that is necessarily torturous. . . . We cannot fathom what it could be." *Id.* at 802-03.

² In determining the meaning or purpose of an initiative measure, California courts have long relied on arguments made by the proponents of the measure in the official voter pamphlets. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 245-46 (1978); *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 580-81 (1949); *Carter v. Com. on Qualifications, etc.*, 14 Cal.2d 179, 185 (1939).

"heinous, atrocious, or cruel" special circumstance been interpreted so as to make "every murderer" death-eligible, state's entire death penalty scheme would likely have been invalid.

CONCLUSION

In sum, contrary to the allegations of petitioner and Amici Alabama, et al., the "heinous, atrocious, or cruel" language of California's death penalty law is not an operative feature of that law nor, viewed in context, can it be deemed "equivalent to" or "to the same effect as" such language in other states' death penalty laws.

Dated: March , 1988

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